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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858

[redacted], MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants (Wilson, Lefkowitz, Fine and Bleisheim) appeal from a final judgment of the United States District Court for the Southern District of New York entered on November 6, 1974, which declared unconstitutional New

York Civil Practice Law and Rules (CPLR) 6201, subsec. (4), (5) and (8) and enjoined their enforcement. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States. A similar statement is being filed independently by the appellants Curtis Circulation Company and Continental Casualty Co.

Opinions Below

The opinion and order of the District Court convening the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 is reported below at 377 F. Supp. 1055 and reproduced herein as Appendix "B" (15a).

The opinion of the three-judge court is not yet reported. It is reproduced herein as Appendix "A" (1a).

Jurisdiction

This suit was brought pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 to declare unconstitutional and enjoin the operation of New York's attachment statute (N.Y. Civil Practice Law and Rules 6201 *et seq.*) as it allows attachment under CPLR 6201, subsec. (4), (5) and (8). The final judgment of the District Court was entered November 6, 1974. The State defendants filed their notice of appeal on November 27, 1974; the defendants Curtis Circulation and Continental Casualty filed their notice of appeal on November 29, 1974. Copies of the judgment and notices of appeals are attached as Appendices "C", "D" and "E". The jurisdiction of the Supreme Court to review the decision and judgment herein is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Statute Involved

New York Civil Practice Law and Rules (CPLR) 6201 (4), (5) and (6), 6211 and 6223. The pertinent provisions of 6201 and 6211 are found at footnote 1 of the three-judge court opinion (Appendix "A", 1a) and the entire Article 62 of the CPLR is Appendix "F" (37a).

Questions Presented

1. Does New York's Civil Practice Law and Rules, Article 62 violate any due process requirements of the Fourteenth Amendment in the procedure provided for judicially supervised *ex parte* orders of attachment?

2. Was the District Court correct in concluding the supposed lack of a meaningful opportunity to vacate an order of attachment renders the statute unconstitutional?

3. Is the existence of a vendor's lien and possessory interest necessary to the constitutionality of an attachment statute?

Facts

This is an action for declaratory and injunctive relief brought pursuant to the Civil Rights Law to vacate an attachment granted pursuant to New York CPLR Article 62 on grounds stated in CPLR 6201 (4), (5) and (8).

A three-judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284, held New York CPLR 6201 (4), (5) and (8) unconstitutional primarily for failure to afford an attachee such as appellees a meaningful opportunity to vacate the attachment granted *ex parte*. It also appeared to find alternative grounds in the attaching party's lack of a possessory interest and vendor's lien in the property attached. On November 6, 1974, a final judgment dated

November 1, 1974, was entered, which included a determination that CPLR 6201, subsec. (4), (5) and (8), as allowed under CPLR 6211, is unconstitutional and enjoined. An injunction against enforcement issued until and unless a meaningful oportunity to vacate is provided. The Sheriff of the City of New York was ordered to release the attached property. However, the judgment also included a stay of all of the above, pending the instant appeal (31a-32a).

The underlying facts of the case are not in dispute for purposes of this appeal. They are stated succinctly in the opinion of the convening judge and the three-judge court as well as the companion Jurisdictional Statement of the appellants Curtis and Continental.

Briefly stated, appellant Curtis Circulation Company had a contract (August, 1971) with appellee Sugar and a corporation, Champion Sports.* Curtis advanced monies under a magazine distribution agreement to Champion, which the former was entitled to recover from Champion under the terms of the contract.

In due course, Curtis became aware of certain actions by Champion which indicated that it (Curtis) was being defrauded. Namely—Wrestling Revue, Inc. had sold all of the periodicals to third parties. It also appeared the moving force behind all of these transfers was Sugar. The end result would be to strip Champion of all its assets and deprive Curtis of its security under the agreement.

As a result Curtis, to protect its security (Champion's assets), applied to the Supreme Court, New York County for an order of attachment. CPLR 6201 (4), (5) and (8). In accordance with statute, this application was supported by, as the opinion of the three-judge court states, "an extensive and detailed affidavit" (2a).

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* Curtis contends that Champion was actually non-existent.

Three grounds were asserted:

(a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201(4)];

(b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and

(c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)].

In addition, Curtis posted a $10,000 bond to protect the defendant in the event the latter prevails or if it is finally decided the attachment was improper. This would cover all legal costs and damages. CPLR 6212(b). The attachment was granted, and within 10 days the papers were filed as well as the summons and complaint, *id.*, 6212(c). The Sheriff levied on the property and without any further state court proceeding—i.e. seeking to vacate the attachment CPLR 6223, the appellees instituted suit in federal court. This resulted in the judgment all defendants, except the Sheriff (McCloskey) who never appeared, have appealed.

The Questions Presented on this Appeal are Substantial

This Court has only the last-term announced that a deprivation of private property need not be preceded by a hearing. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611 (1974). Indeed, this Court in *Mitchell,* cited its prior unanimous approval of prejudgment attachment liens effected by creditors, without notice, hearing or even judicial order. *Mitchell* at 613 citing *Coffin Bros.* v. *Bennett,* 277 U.S. 29, 31 (1928). See also *Ownbey* v. *Morgan,* 256 U.S. 94 (1921).

It is against this background, that the three-judge court nevertheless found the New York attachment statute unconstitutional.

The district court's opinion read *Mitchell* as a limited exception to the *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), that there must be notice and an opportunity for a hearing before a person can be deprived of property, Id., at 80, 81, 82. To the contrary, it is just as clear from *Mitchell* that the three judge court read *Fuentes* too broadly.* The Louisiana sequestration statute ruled constitutional in *Mitchell* permitted seizure of a chattel pursuant to court order obtained *ex parte*. Reading *Fuentes* and *Mitchell* together, the apparent distinction is that in *Fuentes* there was no court order and no notice to the defendant while in *Mitchell* there was a court order but no notice. *Mitchell* laid down the rule "that a hearing must be had before one is *finally* deprived of his property . . .", Id. at 611. As determined by *Mitchell*, the problem is not lack of notice, but lack of a court order. Notice and hearing can be postponed.

The district court grudgingly read *Mitchell* as only leaving a "narrow door of constitutionality" (6a), and persisted in the expansive view that *Fuentes* stated the general binding rule of unconstitutionality for prejudgment *ex parte* procedures. This delimitation of *Mitchell* by the district court and expansion of *Fuentes* appears to be clearly erroneous. The attachment provisions of long standing in New York and other states as traditional remedies in creditor-debtor relations should not suffer this delimitation.

In fact, there are numerous parallels between the Louisiana statute, Code of Civil Procedure (C.C.P.), and New York's procedure (7a-8a, 27a-28a).

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* It should be noted five Justices of this Court (four of whom dissented and one of whom concurred (POWELL, J.) stated that *Fuentes* was overruled by *Mitchell*. 416 U.S., at 623, 634.

(1) A court order is required; *Mitchell*, id. at 616; Cf. La. C.C.P. Art. 281, 282, 283; N.Y. CPLR 6212(a).

(2) An affidavit is required to demonstrate the grounds for seizure, *Mitchell*, id. at 616, La. C.C.P. Art. 3501; N.Y. CPLR 6212(a).

(3) The attaching creditor must post a bond; La. C.C.P. Art. 3574; N.Y. CPLR 6212(b).

(4) The defendant has the right to regain possession of his property by posting a bond; La. C.C.P. Art. 3507, N.Y. CPLR 6222.

(5) The statute—

> "entitled the debtor immediately . . . to seek dissolution of the writ, which must be ordered unless the creditor proves the grounds upon which the writ issued . . ., failing which the court may order return of the property and assess damages in favor of the debtor including attorney fees." (8a) La. C.C.P. Art. 3506.

The first four as recited in *Mitchell* were found present in New York's statute. It was only the fifth which was found lacking on the basis of the District Court's reading of CPLR 6223. Assuming the district court was correct in its reading of New York law on the scope of the hearing under CPLR 6223 to vacate an attachment,* this reading raises the substantial question whether the fact by itself that defendant has the burden of proof in New York (9a) thereby renders the statute unconstitutional, as determined

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* The decision, 8a, calls 6223 the "sole mechanism available to a defendant who seeks to vacate the attachment." This is obviously erroneous as CPLR 6222 permits discharge of the attachment by posting a bond.

by the district court, despite all the fundamental similarities.

Contrary to the opinion below, 8a, the "sole basis" for vacating an attachment is *not* that the attachment "is unnecessary to the security of the plaintiff" CPLR 6223. It is just one ground for vacating an attachment. Another ground is that the attachment was unauthorized in the particular action. See *Maitrejean* v. *Levon Properties Corp.*, 45 A D 2d 1020, —— N.Y.S.2d —— (2d Dept. 1974). In *Maitrejean* the appellate court stated ". . . plaintiffs have failed to establish any intent to defraud creditors." Contrary to the District Court's conclusion as a matter of law the attaching plaintiff has the burden to establish the grounds for the attachment.

The district court made the observation (9a) that the merits of the action are irrelevant on a motion to vacate the attachment under § 6223. However, the same situation obtains in Louisiana. *Tucker & Schonekas* v. *Al Dohmann Chevrolet, Inc.*, La. App., 260 So. 2d 99, 100-101 (1972) ("Official Revision Comment (c) under Article 3506 states that only the grounds for the auxiliary remedy, i.e., dissolution of the writ and damages for wrongful sequestration, may be inquired into on the motion to dissolve and not the merits of the main demand"). In *Lindsey* v. *Normet*, 405 U.S. 56, 64 (1972), this Court held that it was "unable to conclude that . . . limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment" as concerns an action to recover possession of realty.

Furthermore, to distinguish *Mitchell* on the basis of a vendor's lien (10a) is to put form above substance. And to state that the fraud ground for attachment 6201(8) is unsuitable for determination on documentary proof alone (11a), is to ignore that the determination does not concern the merits and that Curtis obtained the attachment on three grounds, and fraud plays only a part therein (6201[4], [5] and [8]). A cause of action asserting fraud is easy to determine. Indeed, the provision for fraudulent intent in 6201[4], is more protective than La. C.C.P. Art. 3571, which allows sequestration on a simple claim of ownership, or a mortgage, lien, or privilege thereon, "if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues. . . ." There is no issue therein as to actual *intent*. Cf. CPLR 6201[4]. This Court has also declared that "(t)o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide. . . ." *Rothschild* v. *Knight*, 184 U.S. 334, 341 (1902).

If the district court had followed *Mitchell*, it would have looked at New York procedure "as a whole", 416 U.S., at 610, to see that the state statute has reached a constitutional accommodation of the respective interests of the parties. The attachment procedures are of such pervasive effect in the entire nation as to warrant plenary consideration.* Already the instant decision has been questioned by a recognized commentator in New York, Dean Joseph M. McLaughlin of the Fordham Law School; New York Trial Practice, New York Law Journal, Nov. 8, 1974, p. 1.

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* This Court has granted *certiorari* in *North Georgia Finishing Inc.* v. *DiChem, Inc.*, 417 U.S. 907 (5/28/74) to review 231 Ga. 260, 201 S.E. 2d 321 (1973). This involves pre-judgment garnishment (or attachment) *without* a court or judge's order, a distinction from the instant case.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Dated: New York, New York, December 31, 1974.

Respectfully submitted,

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Appendix A, Opinion of Three-Judge Court Sugar v. Curtis Circulation Company (S.D.N.Y. 74 Civ. 78).

This suit attacks the constitutionality of the New York Attachment Statute, CPLR § 6201 *et seq.*, which permits ex parte pre-judgment attachment of the property of a defendant. In particular, it is claimed that CPLR § 6201 (4)(5) and (8), and CPLR § 6211,[1] which collectively allow such attachment upon a plaintiff's ex parte allegation that the defendant has defrauded him, violate the due process clause of the Fourteenth Amendment in depriving the defendant of property without prior notice or hearing. Jurisdiction is alleged under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, 2202, 2281, and 2284, and plaintiffs seek declaratory and injunctive relief. By an earlier opinion, —— F. Supp. —— (1974), a single judge found that the complaint presented a substantial constitutional question under the test of *Goosby* v. *Osser,* 409 U.S. 512 (1973) and *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962). This three judge court was convened to hear the matter pursuant to 28 U.S.C. § 2281 *et seq.*

I.

Familiarity with the facts set forth in detail in the opinion of the convening judge is assumed. For present purposes it is sufficient to state that in August, 1971 plaintiff Sugar and his controlled corporation, Champion Sports Publishing, Inc. (Champion) contracted with defendant Curtis for the distribution by Curtis of Champion's publications. In the course of their dealings Curtis advanced funds to Champion which it was entitled to recoup under the terms of their agreement.

Sugar's corporate satrapy also included a publisher, Wrestling Revue, Inc. (Westling), a plaintiff here. About a year after the consummation of the Champion-Curtis con-

tract, Curtis learned—or came to believe—that it had been defrauded because Wrestling, claiming to own periodicals which Curtis had the right to distribute under the Champion agreement, had contracted to sell some of them to third parties.

Curtis thereupon notified one such third party, National Sports Publishing Corporation (National, a defendant here), that it asserted a claim to moneys payable by National to Wrestling. National's response was to advise Wrestling and Sugar that it was withholding sums payable by National to Wrestling. On March 5, 1973, Wrestling sued National for breach of contract in New York Supreme Court, Westchester County. Subsequent to commencement of the Westchester action, Curtis moved in New York Supreme Court, New York County, without notice to Sugar, Champion or Wrestling, and prior to the filing of a complaint, for an order directing the Sheriff to levy on any property of Sugar, Champion or Wrestling. Curtis' motion, supported by an extensive and detailed affidavit, was based on its claim that:

> (a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201 (4)];
>
> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and
>
> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)].

Curtis asserted that it was owed approximately $28,500. plus probable interest, Sheriff's fees and expenses. It

posted a $10,000 bond to protect Sugar, Champion and Wrestling against the possibility that its claim was not ultimately proven. On April 13, 1973, still prior to Curtis' commencement of suit against Sugar, Champion and Wrestling, and without notice to them, but in accordance with CPLR § 6201 *et seq.* Mr. Justice Fine granted the order of attachment.

The attachment order and the consequent sheriff's levy on National,[2] precipitated this suit in which the original roles of the parties are reversed. Sugar and Wrestling are recast as the plaintiffs, while Champion and National are two defendants in a large group including the sheriff and various state officials charged with the enforcement of the statutes under attack.

II.

Although the facts are relatively complex, the issue before us is a narrow one[3] because several recent Supreme Court decisions have dealt with similar statutes. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Mitchell* v. *W. T. Grant Co.*, 43 U.S.L.W. 471 (U.S., May 13, 1974).

Prior to *Sniadach*, decisions of the Court consistently sustained the constitutionality of prejudgment seizure of property subject to litigation, reasoning that ultimate adjudication on the merits would assure a defendant's rights. See, e.g., *Ownbey* v. *Morgan*, 256 U.S. 94 (1921); *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29 (1928) and, particularly *McKay* v. *McInnes*, 279 U.S. 820 (1929) *affirming per curiam* the constitutionality of a Maine statute which provided for an ex parte order of attachment without requiring a supporting affidavit or plaintiff's bond.[4] *Sniadach* breached this previously impenetrable wall of

authority. At issue in that case was the Wisconsin garnishment statute, which permitted a creditor to require the employer of a defendant alleged to be his debtor to withhold part of the defendant's wages pending final adjudication on the merits. The Court invalidated the statute holding that "absent notice and prior hearing [citation omitted] this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 342. In concurrence Mr. Justice Harlan emphasized "that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property *or its unrestricted use,*" 395 U.S. at 343 (emphasis added). Although *Sniadach* rested on broad principles of due process, its intended impact was carefully limited. As the *Mitchell* Court later observed:

> "*Sniadach* involved the prejudgment garnishment of wages—'a specialized type of property presenting distinct problems in our economic system.' [citing Sniadach] Because '[t]he leverage of the creditor on the wage earner is enormous' and because 'prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall,' it was held that the Due Process Clause forbade such garnishment absent notice and hearing. *Sniadach,* 395 U.S. at 341-342. In *Sniadach* the Court also observed that garnishment was subject to abuse by creditors without valid claims. . . ." 42 U.S.L.W. at pp. 4675-76.

These qualifications limit the significance of *Sniadach* as a guide to the determination of the issue before us.

The ruling in *Fuentes* v. *Shevin, supra,* is much closer to home. *Fuentes* dealt with the constitutionality of the Florida and Pennsylvania replevin Statutes which, as the *Mitchell* Court observed,

> ". . . permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause." 42 U.S.L.W. at 4676.

Starting from the premise that "a temporary nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," the *Fuentes* court broadened the *Sniadach* rule beyond cases involving the necessities of life, and held that, with the limited exceptions,[5] the Due Process Clause requires an opportunity for a hearing prior to a deprivation of property:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession from arbitrary encroachment—to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed the prohibition against the deprivation of property without

> due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." 407 U.S. at 80-81.

Lower courts generally construed *Fuentes* to hold that, with the exceptions already noted,[6] statutes permitting pre-judgment seizure of property without prior notice were at best suspect and at worst unconstitutional; accordingly *Fuentes* toppled a variety of state replevin statutes and similar provisions permitting such ex parte seizures. That case, however, is not the final word on the constitutional adequacy of pre-judgment ex-parte seizure of property.

In *Mitchell* the Court seriously narrowed the impact of *Fuentes*—so seriously indeed that Justice Powell and Brennan believed the majority to have overruled *Fuentes*. *Mitchell*, like *Fuentes*, involved a Louisiana statute authorizing ex parte prejudgment seizure of property subject to a vendor's lien. However, the Court found constitutionally significant differences between the Florida and Pennsylvania statutes at issue in *Fuentes* and the Louisiana law before it, whose validity it sustained. The issue before us, therefore, is whether the New York provisions, CPLR §§ 6201(4), (5) and (8) and § 6211, squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*.

Mitchell found several procedural assurances which critically distinguished the Louisiana statute from the Florida and Pennsylvania provisions in *Fuentes:* (1) *Judicial* approval of the sequestration order was required; (2) the grounds for sequestration had to be clearly demonstrated in the affidavit supporting the writ; (3) the attaching creditor was obliged to post a bond; (4) the buyer

(debtor) had the right to regain possession of his property by posting a bond and finally, (5) the statute "entitles the debtor immediately [after sequestration] to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued', Art. 3506, the existence of the debt, lien and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees." *Mitchell*, 42 U.S.L.W. at 4673.

III.

There is no doubt that, as Curtis argues here, there are substantial parallels between the pertinent CPLR provisions and the Louisiana provisions upheld in *Mitchell:* New York law (CPLR § 6219a) meets *Mitchell's* requirements that an attachment order be subject to judicial approval and based on a showing by affidavit that there is a cause of action and establishing one or more grounds for issuance of an order of attachment. Like the creditor in *Mitchell*, moreover, a New York creditor must post a bond to indemnify the defendant-debtor against damages and fees in the event that the attachment is ultimately proven to have been unjustified (CPLR § 6212(b)). Finally, the New York statute, like the Louisiana statute, enables the debtor-defendant to regain possession of his attached property by posting a bond, CPLR § 6222. Taken together, therefore, the New York provisions contain all but one of the indices which led the *Mitchell* court to find the Louisiana statute constitutional.

Unlike the Louisiana statute, however, the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must

prove the grounds "upon which the writ issued." (42 U.S.L.W. at 4673.)

We find that the opportunity for such a hearing was critical to the holding in *Mitchell*, and that its absence renders New York's statute fatally defective.

IV.

It is true that under the New York law a defendant has the right to move to vacate the attachment. Section 6223 of the statute provides in pertinent part:

> "Prior to the application of property or debt to the satisfaction of a judgment, the defendant . . . may move, on notice to each party and the Sheriff, for an order vacating . . . the order of attachment . . . If, after the defendant has appeared in the action, the court determines *that the attachment is unecessary to the security of the plaintiff*, it shall vacate the order of attachment." (emphasis added)

There are several reasons why § 6223—the sole mechanism available to a defendant who seeks to vacate the attachment—does not meet the standards of the *Mitchell*-Louisiana statute which provided in straightforward language (Article 3506, Louisiana Code of Civil Procedure): "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration *unless the plaintiff proves the grounds upon which the writ was* issued." (emphasis added)

By its terms, that is, the Louisiana law required that the attachment be vacated unless the grounds upon which it was issued are proven, and imposed the burden of such proof on the creditor.

The New York Statute affords neither protection. The sole basis for vacating the attachment under the CPLR is *not* that the grounds upon which it has been issued are unproven, but rather that the attachment "is unnecessary to the security of the plaintiff"; and the burden of proof is not, as in *Mitchell*, on the plaintiff, but on the defendant.

That this is not too narrow or literal a reading of the language of 6223 is resoundingly confirmed by numerous holdings of the New York courts. Without exception they have ruled—for at least 50 years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based "clearly indicate that the plaintiffs must ultimately fail." *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 377 (1923). The burden is on the defendant to establish that the plaintiff *cannot* succeed, *Bard-Parker Co.* v. *Dictagraph Products Co.*, 258 App. Div. 638, 17 N.Y.S. 2d 588 (1st Dept. 1940); and to demonstrate that the plaintiff has not established a cause of action which permits attachment, *American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N.Y. 322, 325 (1948); and to establish that the attachment is unnecessary for the security of the plaintiff, *Hydromar Corp. of Delaware* v. *Construction Aggregates Corp.*, 32 A.D. 2d 749, 300 N.Y.S.2d 797 (1st Dept. 1969); *George A. Fuller Co.* v. *Vitro Corp. of America*, 26 A.D.2d 916, 274 N.Y.S.2d 600 (1st Dept. 1966). *See also B.B. Weit Printing Co., Inc.* v. *Frances Denney, Inc.*, 300 F. Supp. 405, 408 (S.D.N.Y. 1969).

Indeed under the decisions of New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223—a construction which we believed is proper in the light of the strictly limited word-

ing of the law. *Kneapler* v. *Braufman*, 266 App.Div. 756, 41 N.Y.S.2d 261 (2d Dept. 1943); *Bard-Parker Co., Inc.* v. *Dictagraph Products Co., supra.* As Judge Motley put it in *Marklin* v. *Drew Properties Corp.*, 280 F.Supp. 176, at 179 (S.D.N.Y. 1967):

> "Under the law of New York it is settled that • • • the court should not attempt to decide in advance the merits of the controversy by vacating the attachment unless the complaint and affidavits *clearly indicate* that the plaintiff *must ultimately fail.*" (emphasis in original)

These considerations alone would be dispositive; but we believe that there are other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone.

First, the plaintiff-creditor in *Mitchell* had by virtue of a vendor's lien an actual possessory interest in the attached property, a fact the Court thought significant:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite,* where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property . . ." 42 U.S.L.W. at 4672-73.

In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion.

Second, in *Mitchell* the sole issues before the Louisiana court which granted the sequestration order were "the existence of the debt, the lien and the delinquency." As the Supreme Court commented, "These are ordinarily uncomplicated matters that lend themselves to documentary proof," 42 U.S.L.W. at 4674, ". . . documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default." 42 U.S.L.W. at 4674 and 4677.

Here, on the other hand, the issue before the state court considering the issuance of the attachment order was whether Sugar, Champion and Wrestling had defrauded Curtis. The Supreme Court itself has emphasized that such issues, which involve determination of subjective elements of motive and intent, are notably unsuitable to determination on documentary proof alone. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Indeed, the *Mitchell* court relied upon this principle in distinguishing the facts before it from those present in *Fuentes:*

> "As in *Bell* v. *Burson, supra,* where a driver's license was suspended without a hearing, when the suspension was premised on a fault standard, see *Vlandis* v. *Kline,* 412 U.S. 441, 446-7 (1973), in *Fuentes* this fault standard was thought ill suited for preliminary *ex-parte* determination." 42 U.S.L.W. at 4677.

A similar conclusion is mandated here. The questions of fraud alleged by Curtis in its motion for attachment are equally "ill-suited" for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief.[7]

For the reasons described we find the challenged provisions unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice. In so holding, we are guided both by the broad rule announced in *Fuentes* and *Mitchell's* insistence on the continued vitality of that rule. In particular, we find that the distinctive procedural features found in *Mitchell* to validate the Louisiana statute are critically incomplete in the New York scheme as construed by the New York courts.

Settle order on notice.

Dated: New York, New York
October 19th, 1974.

WILFRED FEINBERG C.J.

MORRIS E. LASKER D.J.

RICHARD OWEN D.J.

FOOTNOTES

[1] § 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

§ 6211. Order of attachment

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

[2] In accordance with the sheriff's levy, National paid to the sheriff the moneys which it then owed Wrestling, and it has continued to pay further sums as they accrue. It has also paid the sheriff the sum of $124.17, which it owed to Sugar and which Sugar denominates "Wages," whose attachment Sugar claims to violate his due process rights under *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). The plaintiffs here claim further violation of their due process rights in that the second sheriff's levy was extended without prior notice or hearing in December, 1973 and April, 1974, for a period to expire March 24, 1975, notwithstanding the facts that Curtis had commenced its action against them, and they had interposed answers denying liability.

Appendix A, Opinion of Three-Judge Court
Sugar v. *Curtis Circulation Company*
(S.D.N.Y. 74 Civ. 78).

[3] As a three judge court convened pursuant to 28 U.S.C. § 2281 *et seq.*, we here deal only with the constitutionality of the statute. The earlier decision of the single judge determined that plaintiffs have standing to use, have not waived their right to assert the constitutional claim here, and that the pendency in state court of the earlier actions does not bar this action.

[4] The Maine statute was declared unconstitutional by a unanimous three judge court (Coffin, Circuit Judge and Gignoux and Bownes, District Judges) which relied on *Sniadach* and *Fuentes*. *Gunter* v. *Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973). The Massachusetts attachment statute, on which the Maine Act had been modelled, was declared unconstitutional in *Schneider* v. *Margossian*, 349 F.Supp. 741 (D.Mass. 1972) by a unanimous three judge court (Coffin, Circuit Judge, and Gignoux and Garrity, District Judges) relying on the same cases.

[5] The exceptions included cases in which attachment might be necessary (1) to acquire jurisdiction of the defendant; (2) "to protect the public against [some] sort of immediate harm," where it is "necessary to secure an important governmental or public interest [and] there has been a special need for very prompt action," 407 U.S. at 91; or to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods. 407 U.S. at 93. None of these considerations apply in the case at hand.

[6] Even before *Fuentes*, a number of summary prejudgment statutes had been declared unconstitutional on the authority of *Sniadach*. See citations in *Fuentes*, 407 U.S. at 72, note 5. The cases include the decision of a three judge court convened in the Northern District of New York declaring unconstitutional the New York replevin statute. *Laprease* v. *Raymours Furniture Co.*, 315 F.Supp 716 (N.D.N.Y. 1970). That statute provided for search and seizure of chattels by the sheriff upon filing of an affidavit and undertaking by the plaintiff, and without prior notice to the defendant or court order.- The Statute, subsequently cured by amendment, now requires as conditions to the seizure a court order and service by the sheriff of a copy of such order on the possessor of the chattel. CPLR § 7102(b)(d) (1971).

[7] Affidavit of Stewart J. Friedman, Paragraphs 5 through 8 inclusive, at pages 84-5 of plaintiff's appendix.

Appendix B, Opinion and Order Convening Three-Judge Court (377 F.Supp. 1055).

MEMORANDUM

LASKER, District Judge.

In recent years, the constitutionality of statutes permitting the *ex parte* prejudgment seizure of property has been increasingly open to question. In this suit, plaintiffs seek injunctive and declaratory relief againt the enforcement of Article 62 of the Civil Practice Law and Rules ("CPLR") of the State of New York, which permits prejudgment attachment of property without prior notice or a hearing. Plaintiffs claim that CPLR §§ 6201(4), (5) and (8) and 6211 are unconstitutional on their face, because they permit a deprivation of property without due process of law in violation of the Fourteenth Amendment.

Plaintiffs request the convening of a three judge court pursuant to 28 U.S.C. §§ 2281 and 2284. Defendant, Curtis Circulation Company ("Curtis"), moves to dismiss on the grounds that 1) plaintiffs lack standing to sue because they have not been deprived of property by the operation of the statute; 2) they have waived their right to assert the constitutional claim raised here; and 3) there is a prior action pending in the state courts in which plaintiffs can obtain the full relief sought here.[1]

Plaintiff, Bert Sugar, controls two corporations which publish sports periodicals, Champion Sports Publishing Inc. ('Champion") and Wrestling Revue, Inc. ("Wrestling"), a plaintiff in this action. In August, 1971, Sugar

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[1] Curtis also sought a stay of this proceeding pending decision by the Supreme Court of a case relevant to the constitutional issue raised by plaintiffs. That decision having subsequently been rendered (Mitchell v. W. T. Grant Co., —— U.S. ——, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974)), the motion for a stay is now denied as moot.

and Champion entered into a written agreement with Curtis, pursuant to which the latter was to distribute periodicals for the former. Curtis subsequently made advances to Champion which it was entitled, under the agreement, to recoup from payments received by Champion from distribution of Champion's periodicals.

After the argeement had been in effect for over a year, by which time Champion was substantially indebted to Curtis, the latter became aware of facts which led it to believe that a fraud was being perpetrated on it by Sugar and his controlled corporations. In particular, Curtis learned that Wrestling was holding itself out as the owner of periodicals which Curtis was distributing for Champion and that Wrestling had contracted to sell some of these periodicals to third parties, the consideration for the sale to be received by Wrestling and not by Champion.

As a result of these discoveries, Curtis notified one of the parties with whom Wrestling had contracted, National Sports Publishing Corporation ("National"), a defendant here, that, by virtue of the sums owed it by Champion, it was asserting a claim for the money payable by National to Wrestling. On February 28, 1973, National informed Wrestling and Sugar that it was withholding payment of a sum which became due on that date, because of the interest asserted by Curtis. On March 5, 1973, Wrestling sued National in the New York Supreme Court, Westchester County, on the ground that its failure to make the February 28th payment constituted a breach of their contract. On April 13, 1973, Curtis sued Sugar, Wrestling and Champion in the same court for the sums owing under the distribution agreement. In that action, Curtis obtained an order attaching the funds withheld by National on April 16, 1973, and National paid the sum in question to the Sheriff in compliance with the order. The attachment order also

covered money owed by National to Wrestling payable subsequent to the entry of the order. National has continued to pay over such sums to the Sheriff as they have become due. In May, the two Supreme Court actions were consolidated at the request of Sugar, Champion and Wrestling.

Thereafter, Sugar and Wrestling filed suit in this court claiming that the procedure by which the order of attachment was obtained violated their constitutional rights.

II.

Based on these facts, Curtis moves to dismiss. In the first instance, it contends that plaintiffs do not have standing to challenge the attachment procedure as an unconstitutional deprivation of property, because the order of attachment which gives rise to their attack did not in fact deprive them of any property. The argument runs as follows: When National on February 28, 1973, informed plaintiffs of their intention to withhold payment of the money which it owed them pending determination of who, as between plaintiffs and Curtis, was entitled to receive it, plaintiffs did not have possession of the funds and thus their only recourse was to sue National for breach of contract, which they subsequently did in early March. This right, Curtis argues, was entirely unaffected by the order of attachment obtained by Curtis in the second state court proceeding; attachment merely substituted the Sheriff for National as the holder of the disputed funds. Accordingly, Curtis contends, it deprived plaintiffs of nothing and left them exactly as they were prior to attachment.[2] Curtis

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[2] Curtis' imaginative argument reminds us of a song popular in the thirties, "Life is Just a Bowl of Cherries," two of whose memorable lines ran:

argues further that dissolving the attachment would effectively decide the merits of the state court litigation by according plaintiffs possession of the funds, which they did not have prior to the state court litigation and the right to which constitutes the subject of the litigation.

> "The sweet things in life, to you were
> just loaned,
> So how can you lose what you've
> never owned."

The argument, although ingenious, overlooks a crucial point. Although plaintiffs' possession of the funds was blocked prior to attachment by National's decision to withhold payment, the subsequent attachment transformed the situation in a critical respect. The superimposition, at Custis' behest, of judicial sanction on National's until then purely voluntary withholding of the money deprived plaintiffs and National of the ability to resolve their dispute. It is true that attachment did not destroy plaintiffs' right to sue National, a right which they had already exercised; however, it made the objective of the suit unattainable either by compromise or victory on the merits. As a result of the attachment, resolution of the National Wrestling conflict would no longer have resulted in possession by Wrestling of the disputed funds, since National would have had an off-set to the extent of the amount paid over to the Sheriff. CPLR § 6204. Accordingly, Wrestling and National's theretofore private disagreement could no longer be worked out between themselves, but only in conjunction with a resolution of Curtis' dispute with Champion. Clearly, this result was precisely what Curtis intended in seeking the attachment, which it now argues was merely an empty gesture. It is noteworthy that the deprivation to plaintiffs of the ability to acquire possession of the funds

through compromise with National, which at the time of attachment was only potential, is now actual, since Wrestling and National have in fact reached a settlement of their dispute, which, were it not for the attachment order, would give Wrestling possession of the funds.

Nor is it correct, as Curtis argues, that dissolution of the attachment order would place plaintiffs in a better position than they were in prior to attachment. To the contrary, dissolving the attachment order would return the funds to National, and thus reconstitute the *status quo ante* attachment. National would then be free, now as before, to turn the money over to Wrestling or to continue to withhold it.

We turn to the other grounds asserted on the motion to dismiss, which are predicated on the existence of state court proceedings involving the same parties as are before us. Curtis argues that these proceedings require dismissal, because 1) plaintiffs' failure to assert their constitutional claim in state court constitutes a waiver precluding the suit in this court; 2) relegating plaintiffs to the state courts would further the interests of judicial economy; and 3) this court should abstain pending a determination by the state court.

It is important, at the outset, to note that plaintiffs did not themselves initiate a state court proceeding in which it would have been possible to challenge the constitutionality of Article 62. The suit which plaintiffs brought was against National, not Curtis, and was brought prior to attachment. Since National was merely the garnishee, plaintiffs had no claim against it based on the validity of the attachment. Accordingly, the issue is reduced to whether the fact that Curtis sued plaintiffs obligated them to assert the claimed unconstitutionality of Article 62 as a defense in that proceeding and foreclosed them from commencing this suit.

The parties have cited no cases which are exactly on point[3] nor has our research uncovered any. However, we find guidance in opinions dealing with the appropriateness of requiring exhaustion of remedies or abstaining in cases brought under § 1983.

The decisions are legion to the effect that exhaustion is not required in § 1983 cases. *See, e.g.,* Wilwording v. Swenson, 404 U.S. 249, 251, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971) (per curiam); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967) (per curiam); Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); McNeese v. Board of Education, 373 U.S. 688, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Conover v. Montemuro, 477 F.2d 1073, 1079 (3d Cir. 1972); Stradley v. Andersen, 456 F.2d 1063 (8th Cir. 1972).

As the Court stated in Monroe v. Pape, *supra,* at 183:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese, supra,* 373 U.S. at 672.

and the Court of Appeals for the Eighth Circuit has observed:

> "The law is well-settled that in such cases the very purpose of § 1983 precludes forcing a forum choice on the plaintiff by requiring exhaustion of the state's avenues of litigation." Stradley v. Anderson, *supra.*

Requiring a plaintiff to resort *ab initio* to the state courts for redress of his federal constitutional right is regarded as inconsistent with the intent of § 1983 to provide "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." Mitchum v. Foster, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972). Indeed, the premise underlying § 1983's adoption was that the state courts could not be relied upon to protect these rights:

> "[The] legislative history [of § 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
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> . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242 (citation omitted)

The Supreme Court has also been emphatic in preserving the § 1983 plaintiff's right to a federal forum in cases in which the propriety of abstention has been at issue. In Zwickler v. Koota, holding abstention to have been im-

[3] Curtis relies on Financial Services, Inc. v. Ferrandina, 474 F.2d 743 (2d Cir. 1973). However, that case is readily distinguishable. First, both suits involved in *Ferrandina* were in federal court, thus the plaintiff had the opportunity to air its constitutional claim in a federal forum in the earlier suits. Second, the plaintiff in *Ferrandina* expressly postponed consideration of its constitutional claim to a later date. Third, the *Ferrandina* decision concerns a limited question of appealability and its discussion of waiver is dictum.

proper, the Court said:

> "In thus expanding federal judicial power [by adopting § 1983], Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .' Robb v. Connolly, 111 U.S. 624, 637 [4 S.Ct. 544, 551, 28 L.Ed. 542]. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.'" 389 U.S. 241, 248 (1967) (citations omitted).

Of course, *Zwickler* and the exhaustion cases did not arise from situations in which litigation was actually pending before the state courts. However, it would not be sound law to apply a different rule to such instances either on the theory that the cases mentioned above were intended solely to avoid the delay and inconvenience to the plaintiff of requiring him to commence a new suit in state court, which is not present in a case such as this, or that a federal court should, as Curtis argues here, decline jurisdiction to avoid duplicity of effort when a state court action is actually in progress. Such contentions are untenable in light of the Supreme Court's holding, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), that a litigant

who has been obliged by the abstention of a federal court to seek relief in the state courts cannot be precluded, without his consent, from returning to federal court to litigate his federal claims. As the Court stated:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.'" Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 [29 S.Ct. 192, 53 L.Ed. 382]. *Id.* at 415 (footnote omitted).

In fact, in a footnote which is particularly *apropos* to this case, the Court noted:

> "The reservation [of federal jurisdiction] may be made by any party to the litigation. Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction, 28 U.S.C. § 1441(b), has a right to litigate the federal question there. Once issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." *Id.* at 422, n. 13.

In the instant case, plaintiffs, who were defendants in the state court proceedings, did not have available to them the option of removal to the federal court, inasmuch as the federal claim arose only defensively. C. Wright Law of Federal Courts 52 (1963). However, upon their bringing the federal claim to this court in their own suit, no reason is apparent for departing from the principle enunciated above. Furthermore, the fact that in this case, unlike *England,* the state forum has been imposed on plaintiffs by the opposing litigant rather than the federal court strengthens the argument for preserving their right to press their federal claim here.

It is noteworthy, moreover, that if plaintiffs had in fact asserted their federal constitutional claim in the state court proceeding as Curtis insists they must, they would thereby have lost their right ever to litigate it in federal court. As the Court stated in *England:*

> "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Thus, defendant's position reduces itself to this: By the mere fact of being sued in state court, without which the order of attachment which is the *sine qua non* of this suit could not have issued, plaintiffs were placed in the position of either 1) waving their federal claim by not asserting it in state court or 2) asserting it in state court and electing to forego their federal remedy. Such a position is incompatible with the purpose of § 1983, and we decline to adopt it.

Curtis further requests us to abstain from exercising jurisdiction and to dismiss in order to allow the state courts to adjudicate the issues raised here. Putting aside the very serious question of whether there is any justification for abstention, we note merely that it is the law in this Circuit that abstention is a question for decision by the three judge court. New York State Waterways Association, Inc. v. Diamond, 469 F.2d 419, 423 (2d Cir. 1972); Johnson v. Rockefeller, 58 F.R.D. 42, 48 (S.D.N.Y. 1972).

III.

We turn to plaintiffs' motion to convene a three judge court pursuant to 28 U.S.C. § 2281. The motion should be granted if the complaint at least formally alleges a basis for equitable relief and raises a substantial constitutional question (Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962)), if it attacks a state statute's general application and names a state officer as a defendant (Ince v. Rockefeller, 290 F.Supp. 878, 881 (S.D.N.Y. 1968)). The only prerequisite as to which there is an issue here is whether this case presents a substantial constitutional question.

The determination of that point hangs on whether or not the constitutional issue presented is foreclosed by decisions of the Supreme Court which are analogous to the case at hand. California Water Service Co. v. City of Redding, 304 U.S. 252, 255, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). The "foreclosure" hurdle is not a high one. As the Supreme Court stated in Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed.2d 36 (1973):

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious', Bailey v. Patterson, 369 U.S. [31], at 33 [82 S.Ct.

549, 551, 7 L.Ed.2d 512]; 'wholly insubstantial,' *ibid.;* 'obviously frivolous,' Harnis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [30 S.Ct. 326, 327, 54 L.Ed. 482] (1910); and 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32 [54 S.Ct. 3, 4-5, 78 L.Ed. 152] (1933). The limiting words 'wholly' and 'obviously' have/cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if '"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to versy."' Ex parte Poresky, *supra,* at 32 [54 S.Ct., at 4], quoting from Hannis Distilling Co. v. Baltimore, *supra,* [216 U.S.] at 288 [30 S. Ct., at 327]; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-106 [53 S.Ct. 549, 550, 77 L.Ed. 1062] (1933); McGilvra v. Ross, 215 U.S. 70, 80 [30 S.Ct. 27, 31, 54 L.Ed. 95] (1909)."

Curtis argues that even under *Goosby's* lenient standard, plaintiffs' claim is too insubstantial to require the convening of a three judge court, because the grounds for their challenge to the statute have been destroyed by the Supreme Court's recent decision in Mitchell v. W. T. Grant Co., 42 U.S.L.W. 4671 (U.S., May 13, 1974). In *Mitchell,* the Court upheld the constitutionality of the Louisiana sequestration statute in the face of an attack based on Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and Sniadach v. Family Finance Corp., 395

U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the cases on which plaintiffs primarily rely.

Both *Fuentes* and *Mitchell* involved statutes permitting *ex parte* pre-judgment seizure of property pursuant to a vendor's lien. In *Fuentes,* two such statutes were declared invalid; in *Mitchell,* the statute was upheld.

The *Mitchell* Court distinguished *Fuentes* on several grounds. The sole factual distinction between *Fuentes* and *Mitchell* was that, in the latter, the Court found that the writ of sequestration was available only to avoid waste or alienation of the property subject to the lien with a corresponding risk of destruction or disposition of the property if notice was given to the purchaser-lienee. As to the procedural differences, the statute in *Mitchell* accorded the following protections not available under the statutes struck down in *Fuentes*: 1) The requirement of judicial approval of the sequestration order; 2) the necessity of clearly demonstrating the grounds for sequestration in the affidavit supporting the writ; 3) the posting of a bond by the attaching creditor; 4) the availability of a hearing and dissolution of the attachment order unless the party obtaining sequestration proves the grounds underlying the order; and 5) the ability of the buyer to regain possession of the sequestered property by posting a bond.

Curtis argues that the strong similarity between the statute under attack here and the statute upheld in *Mitchell* requires a finding that the *Mitchell* decisions forecloses submitting plaintiffs' constitutional challenge to a three judge court. We agree that significant parallels exist between the two statutes. Like the Louisiana statute, the first of the three provisions of Article 62 of the CPLR, pursuant to which plaintiffs' property was seized, authorizes attachment where there is reason to fear that the debtor has or may place beyond the reach of the creditor

property which could be used to satisfy the debt. This sub-section, CPLR § 6201(4), establishes as a ground for attachment that "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts." The second provision challenged by plaintiffs, permitting attachment when "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability" (CPRL § 6201(5)), and the third, authorizing attachment if "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit" (CPLR § 6201(8)), do not follow as closely the *Mitchell* justification of avoiding waste or destruction of property. Nonetheless, it presumably embodies the inference that fraudulent activity by a defendant giving rise to a lawsuit may indicate the defendant's willingness to commit fraud to avoid payment of a judgment resulting from the lawsuit.

More significant, however, are the procedural similarities between Article 62 and the *Mitchell* statute. Like the latter, the former provides for judicial approval of the attachment order based on a showing by affidavit and other written evidence that there is a cause of action and that one or more grounds for attachment exist. CPLR § 6212(a). Like the creditor in *Mitchell*, the New York creditor must post a bond to indemnify the debtor for damages and legal fees in the event that the attachment proves not to be justified. CPLR § 6212(b). As in *Mitchell*, the New York statute provides that "[p]rior to the application of property or debt to the satisfaction of a judgment, any interested person may commence a special proceeding against the plaintiff to determine the rights of adverse claimants to the property or debt." CPLR § 6221. Furthermore, the statute, like that in *Mitchell*, enables a party whose

property is attached to regain possession of it by giving an undertaking equal the value of the property or the debt. CPLR § 6222.

However, notwithstanding the striking resemblance between the *Mitchell* statute and Article 62, we find that plaintiffs' challenge to the latter is not foreclosed by the Supreme Court's upholding of the former, because of two differences between *Mitchell* and the case at hand which are significant according to the *Goosby* test. First, *Mitchell* dealt with a situation in which the creditor, by virtue of a vendor's lien, had an actual possessory interest in the attached property. As the majority opinion in *Mitchell* states:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized." 42 U.S.L.W. at 4672-4673 [94 S.Ct. at 1898].

Second, the type of situation found in *Mitchell*, where the grounds for attachment—existence of a vendor's lien and default by the buyer—can readily be established on documentary evidence (42 U.S.L.W. at 4677), differs radically from the case at hand, where the basis for attachment—fraud—is not amenable to such proof.

These distinctions may seem slender in view of the broad language employed in parts of the *Mitchell* decision (see, particularly, Part II of the majority opinion). Nonetheless, we feel constrained to grant plaintiffs' motion to convene a three judge court in light of the breadth of the *Goosby* holding. We note further that even if this result were not required as to the total debt, under *Fuentes*, that

Appendix B, Opinion and Order Convening Three-Judge Court (377 F.Supp. 1055).

part of the attachment which represents garnishment of plaintiff Sugar's wages might require submission of the case to a three judge court under *Sniadach*, whose precedential value as to such garnishment is unaffected by *Mitchell*. (*See* 42 U.S.L.W. at 4675-4676).

Accordingly, defendant's motion to dismiss is denied. Plaintiffs' motion to convene a three judge court is granted.

It is so ordered.

Appendix C, Judgment Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COUNTER-JUDGMENT
74 Civ. 78
(MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. McCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

Plaintiffs having commenced an action for a declaration that Article 62 of the Civil Practice Law and Rules (CPLR) of the State of New York is unconstitutional,

Now, upon the pleadings,

IT IS HEREBY ADJUDGED that plaintiffs' motion for a declaratory judgment and injunctive relief is hereby granted to the extent indicated herein, and it is further

ORDERED and ADJUDGED that the Civil Practice Law and Rules of the State of New York, § 6201, subsec. (4), (5)

and (8), as allowed under § 6211, is declared unconstitutional and the operation of said § 6201 (4), (5) and (8) are hereby enjoined against plaintiffs, and it is further

ORDERED and ADJUDGED that the defendants are enjoined from enforcement of CPLR, Article 62 against plaintiffs in cases of attachment under subsec. (4), (5) and (8) of § 6201, as granted under § 6211, until and unless a meaningful opportunity to vacate an attachment is provided under CPLR 6223 or by the Courts of the State of New York and it is further

ORDERED and ADJUDGED that the defendant Sheriff of the City of New York, release said attachment of plaintiffs' property now being held without any deduction for fees, costs or expenses and it is further

ORDERED and ADJUDGED that the herein judgment be stayed on condition that the defendants (one or all) timely file a notice of appeal to the United States Supreme Court as provided by law, and such stay continue until disposition of the appeal or until further order of the Supreme Court.

Dated: New York, New York, November 1, 1974.

WILFRED FEINBERG
HON. WILFRED FEINBERG
U.S.C.J.

MORRIS E. LASKER
HON. MORRIS E. LASKER
U.S.D.J.

RICHARD OWEN
HON. RICHARD OWEN
U.S.D.J.

JUDGMENT ENTERED:—11-6-74

RAYMOND F. BURGHARDT
Clerk.

Appendix D, Notice of Appeal (Curtis and Continental).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ 78 (MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. MCCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendants, Curtis Circulation Company and Continental Casualty Company, in the above named action hereby appeal to the Supreme Court of the United States from the judgment entered on November 6, 1974 which *inter alia* declared unconstitutional the Civil Practice Law and Rules of the State of New York, Section 6201, subsections (4), (5) and (8) as allowed under Section 6211 of said Act, and from each and every part thereof, except the stay of said judgment contained in the last paragraph thereof.

Appendix D, Notice of Appeal (Curtis and Continental).

This appeal is taken pursuant to Title 28 U.S.C. 1253.

Dated: November 27, 1974.

YOUNG, SONNENFELD & BUSNER

By S/ PHILIP H. BUSNER
A Member of the Firm
Attorneys for Defendants
Curtis and Continental
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JOHN J. MCCLOSKEY
Sheriff of the City of New York
31 Chambers Street
New York, New York 10007
(212) 374-5600

Filed: Clerk's Office United States
District Court, Southern
District of New York,
November 29, 1974.

Appendix E, Notice of Appeal (Wilson, Lefkowitz, Fine and Beisheim).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 78 (MEL)

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

against

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. MCCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, that defendants Wilson, Lefkowitz, Fine and Beisheim hereby appeal to the United States Supreme Court from a final judgment of a statutory three-judge District Court entered in the United States District Court for the Southern District of New York on November 6, 1974, and this appeal is taken from each and every part of the judgment except

Appendix E, Notice of Appeal (Wilson, Lefkowitz, Fine and Beisheim).

the last decretal paragraph which stayed the judgment on condition that this notice of appeal be timely filed.

Dated: New York, New York, November 26, 1974.

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Wilson, Fine, Beisheim
and Pro Se
By:

s/ A. Seth Greenwald
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Filed: Clerk's Office United States
District Court, Southern
District of New York,
November 27, 1974.

Appendix F, Article 62 of the Civil Practice Law and Rules (New York).

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6202. Debt or property subject to attachment; proper garnishee.

6203. Attaching creditor's rights in personal property.

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6214. Levy upon personal property by service of order.

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6216. Levy upon real property.

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6219. Garnishee's statement.

6220. Disclosure.

6221. Proceeding to determine adverse claims.

6222. Discharge of attachment.

6223. Vacating or modifying attachment.

6224. Annulment of attachment.

6225. Return of property; directions to clerk and sheriff.

6226. Disposition of attached property after execution issued; priority of orders of attachment.

§ 6201. Grounds for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

Appendix F, Article 62 of the Civil Practice Law and Rules (New York).

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

§ 6202. Debt or property subject to attachment; proper garnishee.

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 105 shall be construed to mean "defendant."

§ 6203. Attaching creditor's rights in personal property.

Where a plaintiff has delivered an order of attachment to a sheriff, the plaintiff's rights in a debt owed to the defendant or in an interest of the defendant in personal property against which debt or property a judgment may

be enforced, are superior to the extent of the amount of the attachment to the rights of any transferee of the debt or property, except:

1. a transferee who acquired the debt or property before it was levied upon for fair consideration or without knowledge of the order of attachment; or

2. a transferee who acquired the debt or property for fair consideration after it was levied upon without knowledge of the levy while it was not in the possession of the sheriff.

§ 6204. Discharge of garnishee's obligation.

A person who, pursuant to an order of attachment, pays or delivers to the sheriff money or other personal property in which a defendant has or will have an interest, or so pays a debt he owes the defendant, is discharged from his obligation to the defendant to the extent of the payment or delivery.

§ 6211. Order of attachment.

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

Rule 6212. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers. On motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203 that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff.

(b) Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the de-

mand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in the action.

§ 6213. Service of summons.

An order of attachment granted before an action is commenced is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, except that a person upon whom the order of attachment is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity. If the defendant dies within sixty days after the order is granted and before the summons is served upon him or publication is completed, the order is valid only if the summons is served upon his executor or administrator within sixty days after letters are issued. Upon such terms as may be just and upon good cause shown the court may extend the time, not exceeding sixty days, within which the summons must be served or publication commenced pursuant to this section, provided that the application for extension is made before the expiration of the time fixed.

§ 6214. Levy upon personal property by service of order.

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a

person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(b) Effect of levy; prohibition of transfer. A levy by service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, he owes a debt to the defendant or he is in the possession or custody of property in which he knows or has reason to believe the defendant has an interest, or if the plaintiff has stated in a notice which shall be served with the order that a specified debt is owed by the person served to the defendant or that the defendant has an interest in specified property in the possession or custody of the person served. All property in which the defendant is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the defendant, shall be subject to the levy. The person served with the order shall forthwith transfer or deliver all such property, and pay all such debts upon maturity, to the sheriff and execute any document necessary to effect the payment, transfer or delivery. After such payment, transfer or delivery, property coming into the possession or custody of the garnishee, or debt incurred by him, shall not be subject to the levy. Until such payment, transfer or delivery is made, or until the expiration of ninety days after the service of the order of attachment upon him, or of such further time as is provided by any subsequent order of the court served upon him whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the

sheriff, except upon direction of the sheriff or pursuant to an order of the court. A garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at the direction of any person other than the defendant authorized to direct sale or transfer, provided that the proceeds in which the defendant has an interest be retained subject to the levy. A plaintiff who has specified personal property or debt to be levied upon in a notice served with an order of attachment shall be liable to the owner of the property or the person to whom the debt is owed, if other than the defendant, for any damages sustained by reason of the levy.

(c) Seizure by sheriff. Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.

(d) Proceeding to compel payment or delivery. Where property or debts have been levied upon by service of an order of attachment, the plaintiff may commence a special proceeding against the garnishee served with the order to compel the payment, delivery or transfer to the sheriff of such property or debts, or to secure a judgment against the garnishee. Notice of petition shall also be served upon the sheriff. A garnishee may interpose any defense or counterclaim which he might have interposed against the defendant if sued by him. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 6221.

(e) Failure to proceed. At the expiration of ninety days after a levy is made by service of the order of attachment,

or of such further time as the court, upon motion of the plaintiff, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received or as to which a proceeding under subdivision (d) has been commenced.

§ 6215. Levy upon personal property by seizure.

If the plaintiff shall so direct and shall furnish the sheriff indemnity satisfactory to him or fixed by the court, the sheriff, as an alternative to the method prescribed by section 6214, shall levy upon property capable of delivery by taking the property into his actual custody. The sheriff shall forthwith serve a copy of the order of attachment in the manner prescribed by subdivision (a) of section 6214 upon the person from whose possession or custody the property was taken.

§ 6216. Levy upon real property.

The sheriff shall levy upon any interest of the defendant in real property by filing with the clerk of the county in which the property is located a notice of attachment indorsed with the name and address of the plaintiff's attorney and stating the names of the parties to the action, the amount of the plaintiff's claim and a description of the property levied upon. The clerk shall record and index the notice in the same books, in the same manner and with the same effect, as a notice of the pendency of an action.

§ 6217. Additional undertaking to carrier garnishee.

A garnishee who is a common carried may transport or deliver property actually loaded on a conveyance, notwithstanding the service upon him of an order of attachment, if it was loaded without reason to believe that an order

of attachment affecting the property had been granted, unless the plaintiff gives an undertaking in an amount fixed by the court, that the plaintiff shall pay any such carrier all expenses and damages which may be incurred for unloading the property and for detention of the conveyance necessary for that purpose.

§ 6218. Sheriff's duties after levy.

(a) Retention of property. The sheriff shall hold and safely keep all property or debts paid, delivered, transferred or assigned to him or taken into his custody to answer any judgment that may be obtained against the defendant in the action, unless otherwise directed by the court or the plaintiff, subject to the payment of the sheriff's fees and expenses. If the urgency of the case requires, the court may direct sale or other disposition of property, specifying the manner and terms thereof, with or without notice.

(b) Inventory. Within fifteen days after service of an order of attachment or forthwith after such order has been vacated or annulled, the sheriff shall file an inventory of property seized, a description of real property levied upon, the names and addresses of all persons served with the order of attachment, and an estimate of the value of all property levied upon.

§ 6219. Garnishee's statement.

Within ten days after service upon a garnishee of an order of attachment, or within such shorter time as the court may direct, the garnishee shall serve upon the sheriff a statement specifying all debts of the garnishee to the defendant, when the debts are due, all property in the possession or custody of the garnishee in which the defend-

ant has an interest, and the amounts and value of the debts and property specified. If the garnishee has money belonging to, or is indebted to, the defendant in at least the amount of the attachment, he may limit his statement to that fact.

§ 6220. Disclosure.

Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant.

§ 6221. Proceedings to determine adverse claims.

Prior to the application of property or debt to the satisfaction of a judgment, any interested person may commence a special proceeding against the plaintiff to determine the rights of adverse claimants to the property or debt, by serving a notice of petition upon the sheriff and upon each party in the same manner as a notice of motion. The proceeding may be commenced in the county where the property was levied upon, or in the county where the order of attachment is filed. The court may vacate or discharge the attachment, void the levy, direct the disposition of the property or debt, direct that undertakings be provided or released, or direct that damages be awarded. Where there appear to be disputed questions of fact, the court shall order a separate trial, indicating the person who shall have possession of the property pending a decision and the undertaking, if any, which such person shall give. If the court determines that the adverse claim was fraudulent, it may require the claimant to pay the plaintiff the reasonable expenses incurred in the proceeding, including reasonable

attorney's fees, and any other damages suffered by reason of the claim.

§ 6222. Discharge of attachment.

A defendant whose property or debt has been levied upon may move, upon notice to the plaintiff and the sheriff, for an order discharging the attachment as to all or a part of the property or debt upon payment of the sheriff's fees and expenses. On such a motion, the defendant shall give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking. Making a motion or giving an undertaking under this section shall not of itself constitute an appearance in the action.

§ 6223. Vacating or modifying attachment.

Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

§ 6224. Annulment of attachment.

An order of attachment is annulled when the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the plaintiff is fully satisfied, or a judgment is entered therein in favor of the defendant. In the last specified case a stay of proceedings suspends the effect of the annulment, and a reversal or vacating of the judgment revives the order of attachment.

§ 6225. Return of property; directions to clerk and sheriff.

Upon motion of any interested person, on notice to the sheriff and each party, the court may direct the clerk of any county to cancel a notice of attachment and may direct the sheriff to dispose of, account for, assign, return or release any property or debt, or the proceeds thereof, or any undertaking, or to file additional inventories or returns, subject to the payment of the sheriff's fees and expenses. The court shall direct that notice of the motion be given to the plaintiffs in other orders of attachment, if any, and to the judgment creditors of executions, if any, affecting any property or debt, or the proceeds thereof, sought to be returned or released.

§ 6226. Disposition of attached property after execution issued; priority of orders of attachment.

Where an execution is issued upon a judgment entered against the defendant, the sheriff's duty with respect to custody and disposition of property or debt levied upon pursuant to an order of attachment is the same as if he had levied upon it pursuant to the execution. The priority among two or more orders of attachment against the same defendant shall be in the order in which they were delivered to the officer who levied upon the property or debt. The priority between an order of attachment and an execution, or a payment, delivery or receivership order, is set forth in section 5234.

APPENDIX

Supreme Court, U. S.
FILED
JUN 3 1975
DAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statements Filed, January 13, 1975.
Probable Jurisdiction Noted, April 14, 1975.

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Opinion, 3 Judge Court, Reproduced at Jurisdictional Statement p. 1a 98a

Opinion and Order Convening 3 Judge Court, Reproduced at Jurisdictional Statement p. 15a 98a

Judgment, 3 Judge Court, Reproduced at Jurisdictional Statement p. 31a 98a

Notice of Appeal, New York State, Reproduced at Jurisdictional Statement p. 35a 98a

Notice of Appeal, Curtis Circulation Co. and Continental Casualty Co., Reproduced at Jurisdictional Statement p. 33a 98a

Letter of Messrs. Levy and Ledes to the Honorable John J. McCloskey, Sheriff of the City of New York, dated December 21, 1973 (p. 168 of Plaintiffs' Appendix) 99a

Letter of Messrs. Levy and Ledes to the Honorable John J. McCloskey, Sheriff of the City of New York, dated June 20, 1974 (p. 170 of Plaintiffs' Appendix) 101a

Relevant Docket Entries—District Court 74 Civ. 78 Bert Randoloph Sugar, et ano. v. Curtis Publishing Co., et al.

DATE	PROCEEDINGS
1-3-74	Filed complaint and issued complaint
1-16-74	Filed plaintiff's application for convening of three-judge court (returnable January 28, 1974)
1-29-74	Filed answer of defendant National Sports Publishing Corp.
2-1-74	Filed answer of defendant Curtis Circulation Co.
2-8-74	Filed notice of appearance by LOUIS J. LEFKOWITZ for defendants Fine and Beisheim
2-13-74	Filed defendant Curtis' affidavit, notice of motion and memorandum to dismiss complaint.
2-21-74	Filed supplemental affirmation of defendant Curtis in support of motion dismissal
2-26-74	Filed plaintiffs' memo in opposition to defendants' motion
3-8-74	Filed defendant Curtis Circulation's reply memo of law
4-8-74	Filed plaintiffs' application for extension of oral protective order
4-30-74	Filed memorandum on plaintiff's motion filed 4-8-74. Motion for protctive orders is granted. Submit order on notice. *Lasker,* J. (n/m)
5-9-74	Filed protective order. *Lasker,* J. (n/m)
6-18-74	Filed memorandum #40832—accordingly defendant's motion to dismiss is denied. Plaintiffs' motion to convene a three-judge court is granted. It is so ordered. *Lasker,* J.
6-24-74	Filed designation of Judges to hear and determine application for relief pursuant to 28 U.S.C. 2281 and 2284. . . . designates Hon. Morris E. Lasker and Honorable Wilfred Feinberg, U.S. Circuit Judge. . . . Hon. Richard Owen, U.S.D.J.

Relevant Docket Entries—District Court 74 Civ. 78 Bert Randolf Sugar, et ano. v. Curtis Publishing Co., et al.

Date	Proceedings
6-24-74	Filed order that hearing be held on July 10, 1974 . . . submit all papers as follows . . . plaintiffs by 7-1-74 . . . defendants on 7-8-74. . . . (n/m)
6-25-74	Filed plaintiffs' motion for consolidated hearing pursuant to Rule 65(a)(2) and to serve a supplemental complaint pursuant to Rule 15(d) of the FRCP
7-2-74	Filed plaintiffs' appendix. . . .
7-2-74	Filed plaintiffs' brief. . . .
7-8-74	Filed defendants' memorandum of law. . . .
7-8-74	Filed defendant Attorney General pro se and for defendant Wilson Fine and Beisheim affidavit and notice of motion to dismiss complaint. Returnable 7-10-74
7-9-74	Filed defendants' (Curtis Circulation) memo . . . .
7-10-74	Filed stipulation and order discontinuing action against National Sports Publishing Corp. . . . *Owen,* J.
7-10-74	Filed stipulation and order that answer of Curtis Circulation shall be deemed to be answer of Continental Casualty as well. . . . *Lasker,* J.
7-15-75	Filed supplemental answer of Curtis Circulation and Continental Casualty Co.
8-9-74	Filed stipulation discontinuing action as to defendant National Sports Publishing Corp., only without prejudice and without costs to any of said parties . . . W. *Feinberg,* C.J. & M. *Lasker,* J. and R. *Owen,* J.
10-17-74	Filed three-judge court opinion #41322 . . . we find the challenged provisions unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice . . . settle order on notice . . . *Feinberg,* C.J., *Lasker,* J., *Owen,* J. (n/m)

Relevant Docket Entries—District Court 74 Civ. 78 Bert Randolf Sugar, et ano. v. Curtis Publishing Co., et al.

Date	Proceedings
11-6-74	Filed judgment . . . . ordered that the Civil Practice Law and Rules of the State of New York, 6201 subsections (4), (5) and (8); as allowed under 6211 is declared unconstitutional and operation . . . are hereby enjoined against plaintiffs. . . . ordered that the herein judgment be stayed on condition that the defendants (one or all) timely file a notice of appeal. . . . *Feinberg,* C.J., *Lasker,* J. and *Owen,* J. Judgment entered Clerk 11-6-74. . . . n/m
11-27-74	Filed defendant New York State's Notice of Appeal. . . . Notices mailed on 11-29-74 to John G. Ledes, Esq., & Young, Sonnenfeld & Busner.
11-29-74	Filed defendants Curtis Circulation Co. & Continental Casualty Company's Notice of Appeal . . .
12-11-74	Filed amendment to three-judge court opinion #41322 . . . m/n

Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

74 Civil Action No. 78

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

—against—

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. MCCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

Plaintiffs, Bert Randolph Sugar and Wresting Revue, Inc., by their attorneys, Gabriel I. Levy and John G. Ledes, bring this action against the defendants Curtis Circulation Company, Continental Casualty Company, National Sports Publishing Corporation, John J. McCloskey, Sheriff of the City of New York, Malcolm Wilson, Governor of the State of New York, Louis J. Lefkowitz, Attorney General of the State of New York, Sidney A. Fine, Justice of the Supreme Court of the State of New York, First Judicial Dis-

trict and George Beisheim, Jr., Justice of the Supreme Court of the State of New York, Ninth Judicial Distrtict, for the relief requested herein due to defendants' deprivation of plaintiff's civil rights under color of state law, and demanding a district court of three judges, and trial by jury as to all matters triabe as of right by a jury, respectfully allege as follows:

I.

Type of Proceeding

1. This is a proceeding for a preliminary and permanent injunction restraining the enforcement, operation and execution of certain of the provisions of Article 62 of the Civil Practice Law and Rules of the State of New York, permitting the pre-judgment seizure of property in any action where the plaintiff has demanded and would be entitled to a money judgment against one or more defendants, other than for jurisdictional purposes, upon the grounds that such statute is unconstitutional in that it violates on its face the procedural due process requirements of the Fourteenth Amendment to the Constitution of the United States, by providing for the taking of property prior to notice and hearing.

2. This is a proceeding for a declaratory judgment pursuant to the provisions of Title 28, United States Code, §§- 2201 and 2202, for the purpose of determining whether defendants and each of them, their agents, attorneys, employees and successors on behalf of themselves and the State of New York, may continue to enforce certain provisions of Article 62 of the Civil Practice Law and Rules of the State of New York and continue to deny and deprive the plaintiffs of the possession and beneficial use of certain monies an ddebts belonging to the respective plaintiffs, and being held by the defendants John J. McCloskey,

Sheriff of the City of New York and National Sports Publishing Corporation, respectively, pursuant to an Order of Attachment and levies made thereunder, hereinafter more specifically referred to.

II.

Jurisdiction

3. This proceeding arises under the Fourteenth Amendment to the United States Constitution and the Civil Rights Acts of the United States, Title 42, United States Code § 1983 (R.S.§ 1979) commonly known as the Civil Rights Act of April 20, 1871.

4. Jurisdiction is conferred upon this Court by Title 28, United States Code § 1331(a), § 1343(3) and (4), § 2201 and § 2202, § 2281 and § 2284.

5. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

6. This proceeding requires the convening of a three-judge court in accordance with Title 28, United States Code, § 2281 and § 2284, because plaintiffs seek to enjoin and restrain the enforcement, operation and execution of a state statute, Article 62 of the Civil Practice Law and Rules of the State of New York, of state-wide, effect, upon the grounds of the unconstitutionality of certain provisions of such statute.

III.

The Plaintiffs

7. The plaintiff, Bert Randolph Sugar (hereinafter referred to as "Sugar") is a citizen of the State of New

York and resides in Chappaqua, in the County of Westchester in the State of New York, being in the Sourthern District of New York and within the jurisdiction of this Court.

8. The plaintiff, Wrestling Revue, Inc. (hereinafter referred to as "Wrestling Revue"), is a corporation created and existing under and by virtue of the laws of the State of New York, and is a citizen of the State of New York, and maintains its principal office in Katonah, in the County of Westchester, in the State of New York, being in the Southern District of New York and within the jurisdiction of this Court.

IV.

The Defendants.

9. The defendant, Curtis Circulation Company (hereinafter referred to as "Curtis") is a corporation created and existing under and by virtue of the laws of the State of Delaware and a citizen thereof. Curtis has been duly authorized by the State of New York to transact business in the State of New York and maintained an office for such purpose in the County, City and State of New York, being within the Southern District of New York and within the jurisdiction of this Court.

10. The defendant, Continental Casualty Company (hereinafter referred to as "Continental Casualty") is a corporation created and existing under and by virtue of the laws of the State of Illinois, and is a citizen thereof. Continental Casualty has been duly authorized by the State of New York to transact business in the State of New York, including the issuance of surety bonds and other types of undertakings in the State of New York and main-

tains an office for such purpose in the County, City and State of New York, being within the Southern District of New York, and within the jurisdiction of this Court.

11. The defendant, National Sports Publishing Corporation (hereinafter referred to as "National Sports") is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains its principal office in the County, City and State of New York, being in the Southern District of New York, and within the jurisdiction of this Court.

12. The defendant, John J. McCloskey (hereinafter referred to as "Sheriff") is the duly appointed Sheriff of the City of New York, in the State of New York and is required by law to execute all lawful mandates and orders of the Courts of the State of New York, within the City of New York, upon the payment of his lawful fees and is an officer of the State of New York.

13. The defendant, Malcolm Wilson is the duly qualified Governor of the State of New York and is charged that the laws of the State of New York are faithfully executed and is made a defendant herein in his capacity of Governor of the State of New York.

14. The defendant, Louis J. Lefkowitz, is the duly elected Attorney-General of the State of New York and is required to defend all actions and proceedings in which the State is interested, including whenever the constitutionality of a state statute is brought into question, and is made a defendant herein in his capacity as Attorney-General of the State of New York.

15. The defendant, Sidney A. Fine (hereinafter referred to as "Mr. Justice Fine") is a duly elected Justice of the

Supreme Court of the State of New York in and for the First Judicial District, which includes the County of New York and is an officer of the State of New York.

16. The defendant, George Beisheim, Jr. (hereinafter referred to as "Mr. Justice Beisheim") is a duly elected Justice of the Supreme Court of the State of New York, in and for the Ninth Judicial District, which includes the County of Westchester and is an officer of the State of New York.

V.

The New York Attachment Statute [Article 62 of the New York Civil Practice Law and Rules]

17. Article 62 of the Civil Practice Law and Rules of the State of New York contains the New York Attachment Statute, §§ 6201 through 6226, the complete text of which is appended to this complaint as Appendix "A".

18. § 6201 inter-~~a~~lia provides that "[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants" in eight different type situations. Subparagraphs 1, 2, 3 and 7 relate to securing jurisdiction over the defendant and subparagraph 6 relates to the wrongful possession of governmental property and are not involved in this proceeding. The other three subparagraphs 4, 5 and 8 relate to various types of alleged fraud on the part of the defendant and are the specific subject matter of this proceeding.

19. § 6211 which is also the specific subject matter of this proceeding sets forth the required contents of the order

of attachment and provides inter alia "[a]n order of attachment may be granted *without notice,* before or after service of summons and at any time prior to judgment" [Emphasis supplied].

VI.

The Contract Between Wrestling Revue and National Sports

20. On November 28, 1972, as of the 31st day of October, 1972, Wrestling Revue and National Sports entered into a written contract providing for the sale of certain sports publications owned by Wrestling Revue to National Sports for a purchase price of "a minimum of $50,000 and a maximum of $100,000" payable in specified installments. The first installment of $25,000 was paid at the time of the signing of the contract on November 28, 1972. The following two fixed installments of $12,500 each were due and payable on February 28, 1973 and May 28, 1973, respectively. In addition thereto, the contract further provided for additional payments for ten years, based on the after tax profits of National Sports, the total of which were not to exceed $40,000, the first payment due thereunder, if any, is due on March 31, 1974.

21. National Sports failed to make the installment payment of $12,500 due and payable on February 28, 1973 and Wrestling Revue instituted an action as plaintiff and against National Sports, as defendant in the Supreme Court of the State of New York, in and for the County of Westchester, Index Number 6275/1973, as a result of National Sports' breach thereof, by failing to make such installment payment, which action is still pending.

22. As of April 16, 1973, National Sports had failed to make the $12,500 payment to Wrestling Revue due on February 28, 1973 and on such date was indebted to Wrestling Revue in the amount of $12,500. On May 28, 1973, National Sports was further required to make an additional installment payment to Wrestling Revue of an additional $12,500 which it refused and failed to make.

VII.

The Negotiations Between Curtis, National Sports and Wrestling Revue and Their Attorneys

23. Between February 23, 1973 and April 13, 1973, extensive correspondence was had between Curtis and its attorneys and National Sports, its parent company, Whitney Communications Corporation and its attorneys with respect to certain monies that Curtis allegedly claimed were due to it from a company known as Champion Sports Publishing, Inc. (hereinafter referred to as "Champion Sports") for distributing some of the publications sold to National Sports by Wrestling Revue.

24. During such entire period of time the attorneys for both Curtis and National Sports were in constant communication with the law firm of Levy and Ledes the attorneys for both Wrestling Revue and Champion Sports with respect to the alleged claim of Curtis for such monies due to it from Champion Sports.

25. For many months prior to April 13, 1973, Curtis and its attorneys knew that Levy and Ledes were the attorneys for Wrestling Revue, Champion Sports and Sugar, their Chief Executice Officer, and knew that Messrs. Levy and Ledes were available to accept the service of process or appear in court proceedings or at court hearings on behalf of all or some of such clients, as the situation would require.

VIII.

The Deprivation of Plaintiffs' Civil Rights Without Procedural Due Process Under Article 62 of the New York Civil Practice Law and Rules

A.

The Order of Attachment

26. On April 13, 1973, Curtis, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, applied to the Supreme Court of the State of New York, County of New York for an order of attachment pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, directing the Sheriff to levy "upon such property in which Sugar, Wrestling Revue and Champion Sports have an interest and upon such debts owing to them as will satisfy Curtis' demand of $28,588.08 together with probable interest costs and Sheriff's fees and expenses."

27. In support of such application, made in the form of a motion, without notice to Sugar, Wrestling Revue or Champion Sports in an action not then commenced, to be entitled "Supreme Court of the State of New York, County of New York, Curtis Circulation Company, Plaintiff, against Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, Defendants", Index No. 6102/1973, Curtis contended inter alia "that a cause of action for a money judgment exists in favor of Curtis and against Sugar, Wrestling Revue and Champion Sports, jointly and severally, in the sum of $28,588.08 as well as for other sums, together with interest and costs thereon and that Curtis is entitled to recover said sum of $28,588.08 over and above all counterclaims known to it."

28. Curtis further contended inter alia that it was entitled to an order of attachment against the property of Sugar, Wrestling Revue and Champion Sports on the grounds that:

(a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201(4)];

(b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and

(c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)].

29. In further support thereof Curtis submitted to the Court an undertaking of Continental Casualty "in the sum of $10,000, of which amount the sum of $8,570 thereof is conditioned that Curtis will pay to Champion Sports, Wrestling Revue and Sugar all legal costs and damages which may be sustained by reason of the attachment if Champion Sports, Wrestling Revue and Sugar recover judgment or it is finally decided that Curtis was not entitled to an attachment of the property of Sugar, Wrestling Revue and Champion Sports, and the balance thereof [of $1,430] conditioned that Curtis will pay the Sheriff all of his allowable fees."

30. On April 13, 1973, prior to the commencement of any action, and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, or an opportunity to be heard with respect to the validity of Curtis' underlying claim and Curtis' right to an order of attachment, Mr. Justice Fine pursuant to Article 62 of the Civil Prac-

tice Law and Rules of the State of New York signed an order of attachment wherein he made findings of fact adverse to the interests of Sugar, Wrestling Revue and Champion Sports and "[o]rdered the Sheriff of the City of New York or the Sheriff of any county in the State of New York to levy within his jurisdiction at any time before final judgment upon such property in which Champion Sports, Wrestling Revue and Sugar have an interest and upon such debts owing to them as will satisfy Curtis' demand of $28,588.08, together with probable interest, costs and Sheriff's fees and expenses and that he proceed thereon in the manner required by law," thereby violating the procedural due process rights guaranteed to Sugar, Wrestling Revue and Champion Sports by the Fourteenth Amendment to the Constitution of the United States, by providing for the taking of their property by the State of New York without prior notice and an opportunity to be heard.

B.

The Sheriff's Levy

31. On April 16, 1973, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports or their attorneys, the Sheriff by one of his deputys, caused the order of attachment to be served upon National Sports and levied thereunder upon all monies then due pursuant to § 6214 of the Civil Practice Law and Rules and thereafter coming due to Sugar and Wrestling Revue from National Sports up to the amount of $28,588.08, thereby further violating the procedural due process rights guaranteed to Sugar and Wrestling Revue by the Fourteenth Amendment to the Constitution of the United States, by the Sheriff, on behalf of the State of

New York, taking their property then held by National Sports, without prior notice and an opportunity to be heard.

C.

The Payments of Plaintiffs' Money, by National Sports to the Sheriff

32. On April 26, 1973, National Sports served a Garnishee Statement pursuant to § 6219 of the Civil Practice Law and Rules upon the Sheriff with respect to monies then owed by it to Wrestling Revue pursuant to the agreement referred to in ¶ 20 ante and paid to the Sheriff "$9,323.54, in discharge to the extent of such payment of its obligation to Wrestling Revue with respect to the February 28, 1973 purchase price installment", which monies were the property of, and belonged to Wrestling Revue, and to which it was immediately entitled to the beneficial use thereof.

33. On May 2, 1973, National Sports made a further payment pursuant to the order of attachment and levy to the Sheriff of $200 which monies were the property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

34. On May 16, 1973, National Sports made another further payment pursuant to the order of attachment and levy to the Sheriff of $124.17, which monies were the property of and belonged to Sugar and to which he was immediately entitled to the beneficial use thereof.

35. The payments made by National Sports to the Sheriff as set forth in ¶¶ 32, 33 and 34 ante, violated the procedural due process rights of Wrestling Revue and

Sugar guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, by the Sheriff on behalf of the State of New York, taking their property from National Sports, without prior notice and an opportunity to be heard.

D.

The Second Levy

36. As of May 24, 1973, Curtis admitted in the action then pending between it and Sugar, Wrestling Revue and Champion Sports, that the maximum amount that was then due to it from Champion Sports was $17,857.49.

37. Curtis never took the necessary action to reduce the amount of the order of attachment to reflect the reduced amount it claimed as of May 24, 1973.

38. On May 28, 1973, National Sports pursuant to the agreement set forth in ¶ 20 ante was required to make a further installment payment to Wrestling Revue of $12,500 which it refused and failed to make as a result of the order of attachment and Sheriff's levy served upon it on April 16, 1973.

39. On September 24, 1973, the Sheriff re-served the order of attachment upon National Sports and made a second levy again in the amount of $28,588.08, notwithstanding that the maximum amount then claimed by Curtis was only $17,857.49, and of which the Sheriff had already taken possession of $9,647.71 as set forth in ¶¶ 32, 33 and 34 ante, and thereby under color of state law, further violated the procedural due process rights of Wrestling Revue guaranteed to it by the Fourteenth Amendment to the Constitution of the United States by the Sheriff on behalf of the

State of New York, taking the property belonging to Wrestling Revue then held by National Sports without prior notice and an opportunity to be heard.

E.

The Extension of the Second Levy

40. Pursuant to § 6214(b) of the Civil Practice Law and Rules of the State of New York, a levy made under an order of attachment expires ninety days after service thereof and as a result of the refusal and failure of National Sports to pay over to the Sheriff the $12,500 installment due to Wrestling Revue, on May 28, 1973, such second levy made on September 24, 1973 would have expired on December 24, 1973.

41. On December 4, 1973, Curtis, without notice to the attorneys for Sugar, Wrestling Revue and Champion Sports, who had appeared in such action on April 18, 1973 and interposed their answer to Curtis' complaint on April 27, 1973, applied to the Supreme Court of the State of New York, County of Westchester, where the action was then pending, for an order extending the second levy until March 24, 1974.

42. On December 7, 1973, and without notice to Sugar, Wrestling Revue and Champion Sports, or their attorneys, or affording them a prior hearing or an opportunity to be heard with respect to Curtis' application for a ninety day extension of such levy, Mr. Justice Beisheim, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, signed an order granting such motion of Curtis and extended such levy to March 24, 1974, with respect to "[a]ll property in the possession or control of National Sports in which Champion Sports, Wrestling

Revue and Sugar have any title or interest" thereby under color of state law further violating the procedural due process rights guaranteed to Sugar, Wrestling Revue and Champion Sports by the Fourteenth Amendment to the Constitution of the United States, by providing for the continued taking of their property by the State of New York, without prior notice and an opportunity to be heard.

IX.

Irreparable Injury and Damages

43. The defendants and each of them, jointly and severally, on behalf of themselves and the State of New York, under color of state law, in violation of the procedural due process requirements of the Fourteenth Amendment to the Constitution of the United States, have unconstitutionally, unlawfully and wrongfully seized and deprived and continue to deprive plaintiffs of their property, and threaten to continue to seize additional property belonging to the plaintiffs and deprive them of the beneficial use and enjoyment thereof, all without prior notice and without affording plaintiffs an opportunity to be heard with respect thereto.

44. Such action on the part of the defendants, hereinbefore alleged, in depriving plaintiffs of their property without prior notice and hearing under color of state law, in violation of the due process requirements of the Fourteenth Amendment to the Constitution of the United States Constitution, if not immediately enjoined and restrained by this Court, will continue to cause great loss and harm and irreparable injury and damage to plaintiffs in that they will continue to be deprived of their lawful interest, title, possession and use in and to the monies heretofore described, belonging to the plaintiffs or to which they are entitled.

45. Plaintiffs are entitled to the immediate use, peaceful possession and exclusive control of the aforementioned money without the unconstitutional interference thereof, by the defendants under color of state law.

46. Plaintiffs have no plain, adequate or complete remedy at law, as hereinafter more particularly set forth.

47. By reason of the aforesaid unconstitutional and wrongful acts on the part of the defendants, plaintiffs have been and will continue to be injured in their business and property in that:

(a) Wrestling Revue has been unable to continue the operation of its business, including the publication of magazines, thereby destroying its reputation in the publishing, sports and business community, and its ability to secure credit financing and money from the banking, financial and business community have been destroyed and Wrestling Revue has further been damaged to an extent presently unknown.

(b) Sugar has been unable to obtain meaningful employment and his outstanding reputation in the sports and publishing community has been destroyed and Sugar has further been damaged to an extent presently unknown.

X.

The Unconstitutionality of Article 62 of the Civil Practice Law and Rules of the State of New York

48. Article 62 of the Civil Practice Law and Rules of the State of New York, and most particularly § 6201, subparagraphs (4), (5) and (8) and § 6211, insofar as it permits the pre-judgment seizure of property in any action where the plaintiff has demanded and would be entitled to a

money judgment against one or more defendants, without prior notice or hearing is unconstitutional on its face and void as repugnant to and in violation of the due process provisions of subparagraph 1 of the Fourteenth Amendment to the Constitution of the United States since on its face it fails to provide for prior notice and hearing which are aimed at establishing the validity or at least the probable validity of the underlying claim against the alleged debtors before they can be deprived of the unrestricted use of their property or property to which they are entitled and constitutes the deprivation of plaintiff's property, by the State of New York without due process of law.

49. The acts of the defendants and each of them, jointly and severally create an existing dispute between the parties as to plaintiffs' legal rights amounting to a justicable controversy which must be determined by a district court of three judges as required by Title 28, United States Code § 2281, which must be impaneled for this controversy since it seeks an interlocutory and permanent injunction restraining the enforcement, operation and execution of a state statute by restraining the action of officers and officials of the State of New York and others in the enforcement, operation and execution of certain portions of Article 62 of the Civil Practice Law and Rules of the State of New York, upon the grounds of the unconstitutionality thereof.

50. Plaintiff's are entitled to maintain this action and to obtain the relief herein requested from this Court and cannot be required to have recourse for such relief to the Courts of the State of New York, which have recently refused in a justicable controversy to rule on the unconstitutionality of the very provisions of Article 62 of the Civil Practice Law and Rules of the State of New York [§§ 6201 (8), 6211] which are the subject matter of this proceeding,

even assuming contrary to the facts, that the Courts of the State of New York have jurisdiction to grant such relief and that the New York statutes afford plaintiffs an adequate remedy in such courts for the following reasons:

(a) The Federal Constitutional rights for which plaintiffs ask the protection of this Court in this proceeding are based solely upon the provisions of the Fourteenth Amendment to the Constitution of the United States that "[n]o state shall • • • deprive any person of life, liberty or property without due process of law;" with which Article 62 of the Civil Practice Law and Rules of the State of New York [§ 6201 and § 6211] and the defendants' acts herein set forth are in direct conflict and upon specific paramount considerations of Federal, not State policy which can only be adequately and fully determined and protected by a Federal Court.

(b) Denial of plaintiffs' right of access to this Court would deprive plaintiffs of their right to a prompt and expeditious determination of the Federal Constitutional issues involved. Such denial would subject the plaintiffs to the added unnecessary delay and expenses of a costly, protracted and futile litigation through all the Courts of the State of New York, which have heretofore refused to decide the constitutionality of the very state statute involved, only to be finally resolved in the end by a decision of the Supreme Court of the United States.

(c) Plaintiff has no adequate remedy, other than the equitable relief and the redress to which it is entitled to pursuant to Title 28, United States Code § 1983 sought from this Court in the within proceeding.

XI.

Prayer for Relief

WHEREFORE, plaintiffs, Bert Randolph Sugar and Wrestling Revue, Inc. pray for equitable and legal relief against the defendants and each of them, jointly and severally, as follows:

1. That pursuant to the provisions of Title 28, United States Code, §§ 2281 and 2284, a three-judge court be convened forthwith as required therein, to hear and determine the issues herein since the provisions of Article 62 of the Civil Practice Law and Rules of the State of New York, and most particularly § 6201 subparagraphs (4), (5) and (8) and § 6211 insofar as it permits the prejudgment seizure of property in any action where the plaintiff has demanded and would be entitled to a money judgment against one or more defendants, without prior notice or hearing is unconstitutional and void as repugnant to the due process provisions of subparagraph 1 of the Fourteenth Amendment to the Constitution of the United States.

2. That this Court hold and adjudge that as applied to the plaintiffs, Article 62 of the Civil Practice Law and Rules of the State of New York and most particularly § 6201, subparagraphs (4), (5) and (8) and § 6211 and all other provisions thereunder which would affect the order of attachment and levies relating to the property of the plaintiffs and debts due to them herein, insofar, as it permits the pre-judgment seizure of property and debts in any action where the plaintiff has demanded and would be entitled to a money judgment against one or more defendants, without prior notice or hearing is unconstitutional and void on its face as being repugnant and contrary to the due process provisions of subparagraph 1 of the Fourteenth Amendment to the Constitution of the

United States, which provides that "[n]o state shall • • • deprive any person of life, liberty or property, without due process of law."

3. That this court issue an injunction both preliminary and permanent, enjoining the defendants and each of them, jointly and severally, and all of their attorneys, officers, agents, employees and representatives from enforcing, attempting to enforce, continuing to enforce or attempting to put into execution or in any way as against the plaintiffs and restraining the enforcement, operation and execution of, the provisions of Article 62 of the Civil Practice Law and Rules of the State of New York and most particularly § 6201, subparagraphs (4), (5) and (8), and § 6211 and all other provisions thereunder, which would affect the order of attachment and levies relating to the property and debts belonging to the plaintiffs herein.

4. That pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure the trial of this proceeding on the merits be advanced and consolidated with the hearing of the application for a preliminary injunction and pursuant to Title 28, United States Code § 2284 such consolidated hearing and trial be given precedence and assigned for a hearing and trial at the earliest practicable date.

5. Directing and ordering the Sheriff of the City of New York to forthwith pay over and to deliver to the plaintiffs all monies and other property in his custody and possession received by him pursuant to the order of attachment and levies made thereunder, with lawful interest thereon, without any deduction for any fees, costs or expenses.

6. Directing and ordering National Sports Publishing Corporation to forthwith pay over and deliver to the plain-

tiffs all monies to which each of the plaintiffs is legally entitled to receive from National Sports Publishing Corporation.

7. Referring the amount of plaintiffs' damages to a single district judge for hearing and determination:

(a) That plaintiffs recover from such of the defendants and each of them, jointly and severally, in accordance with Title 42, United States Code § 1983, all damages including attorneys fees that each of them have sustained or will hereafter sustain as a result of the acts of each of such defendants, which deprived the respective plaintiffs of their civil rights under color of state law.

(b) That plaintiffs recover from such of the defendants and each of them, jointly and severally who may be liable to them, all damages, including attorneys fees, that each of them have sustained or will hereafter sustain as a result of the fact that Curtis Publishing Company was not entitled to an attachment of the property of the plaintiffs, or either of them;

(c) That plaintiffs recover from such of the defendants, and each of them, jointly and severally, who may be liable to them, as a result of the wilfull, wrongful and unconstitutional acts of such defendants, which deprived the respective plaintiffs of their civil rights, under color of state law, exemplary and punitive damages, in such amounts as shall be determined by the Court.

8. That Bert Randolph Sugar and Wrestling Revue, Inc. prays for such other, further, different and separate relief as to the Court may seem just and proper in the premises and if they have not prayed for proper and sufficient relief, then for such other further and general relief as to which

they may be entitled, together with their costs and disbursements.

Dated: New York, New York
January 2, 1974

GABRIEL I. LEVY
GABRIEL I. LEVY
JOHN G. LEDES
JOHN G. LEDES
of the firm of LEVY AND LEDES
Attorneys for Plaintiffs
270 Madison Avenue
New York, New York 10016
(212) 371-8000

Exhibit "A".

Civil Practice Law and Rules Article 62 (Attachment)
(Reproduced at Jurisdictional Statement 1a)

Answer (Curtis Circulation Company).

[SAME TITLE]

Defendant, Curtis Circulation Company, by its attorneys, Young, Sonnenfeld & Busner, answering the complaint, respectfully alleges as follows:

1. On information and belief, denies the allegations contained in paragraphs 1 and 2 of the complaint.

2. With respect to paragraph 3 of the complaint, on information and belief, denies any jurisdiction by this Court by virtue of the Fourteenth Amendment of the United States Constitution or the Civil Rights Act of the United States, Title 42 United States Code, Section 1983.

3. On information and belief, denies the allegations contained in paragraphs 4, 5 and of the complaint.

4. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in paragraphs 7, 8, 10 and 11 of the complaint.

5. With respect to paragraph 20 of the complaint, on information and belief, Wrestling Revue had no legal right to enter into the purported written contract therein referred to, was not the owner of the publications allegedly sold thereby, the alleged sale was fraudulent and contrived to deprive the creditors of Champion Sports Publishing Inc., including Curtis, of their just claims against said corporation; with respect to the alleged terms of said purported written contract, the Court is referred to said instrument and the legal effect thereof; and except as herein alleged the defendant Curtis denies knowledge or information sufficient to form a belief with respect to the allegations contained in said paragraph of the complaint.

Answer (Curtis Circulation Company).

6. With respect to paragraphs 21 and 22 of the complaint, on information and belief, admits that National did not make the payments referred to therein; on information and belief there were no payments legally due and owing to the plaintiffs by virtue of the invalidity of the purported underlying contract; admits that Wrestling commenced the action therein referred to and that the same is now pending; and except as herein alleged, on information and belief, denies the allegations contained in said paragraphs of the complaint.

7. With respect to paragraph 23 of the complaint, on information and belief, denies that any of the publications referred to were legally sold by Wrestling Revue to National Sports; admits that there was correspondence between Curtis and its attorneys and National Sports and Whitney Communications Corporation and its attorneys with respect to moneys claimed by Curtis from Champion for distributing publications represented to Curtis as being owned by Champion; and except as herein alleged, denies the allegations contained in said paragraph of the complaint.

8. With respect to paragraph 24 of the complaint, admits that during the period specified the attorneys for Curtis and National Sports were in communication with the law firm of Levy and Ledes with respect to the Curtis claim for moneys due from Champion Sports and, except as herein admitted, denies the allegations contained in said paragraph of the complaint.

9. With respect to paragraph 25 of the complaint, admits that prior to April 13, 1973, Curtis and its attorneys were aware that Levy and Ledes had represented Champion Sports, had acquired information from others that said law firm had represented Wrestling Revue and

Champion Sports in transactions involving the purported sale of publications by Wrestling Revue to third parties, which publications had previously been represented to Curtis as being owned by Champion and except as herein admitted, denies the allegations contained in said paragraph of the complaint.

10. With respect to the allegations contained in paragraph 26 of the complaint, admits that prior to April 13, 1973, Curtis applied to the Supreme Court of the State of New York, County of New York for an order of attachment pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York for the relief specified in said paragraph of the complaint (albeit not in the language quoted in the said paragraph of said complaint); that said application in accordance with the said Article 62 was based upon filing with said court of a summons and verified complaint, an affidavit showing grounds for such attachment pursuant to said Article 62 and an undertaking conditioned that Curtis would pay to Champion, Wrestling Revue and Sugar all legal costs and damages which they might sustain by reason of the attachment; that said application was based upon facts which had come to the attention of Curtis, to wit, *inter alia,* that Sugar, Champion and Wrestling without notice to Curtis had purportedly caused Champion to divest itself of the publications which it had represented to Curtis were owned by it, that Wrestling was purportedly claiming title to such publications pursuant to a purported license agreement which had never been revealed to Curtis, that Wrestling had purported to sell such publications to third parties and claimed to be entitled to the proceeds of such sale, that no monies from such sale would flow to Champion and that Champion would be unable by virtue of allegedly having no assets to make payment to Curtis of its claim against Champion; that said

application was based upon facts which were clearly indicative of a fraudulent scheme to remove the assets of Champion beyond the reach of its creditors including Curtis; that the facts alleged on said application clearly indicated that Sugar and Wrestling had no legal right to the proceeds of said sale and that whatever rights Champion might have to such proceeds were restricted to its role as a trustee for its creditors; that the rights of the respective parties, including Curtis, in and to the proceeds of said purported sale required determination by a Court of law and that until such rights were determined, such proceeds should be immunized from dissipation by any one of the claimants; that said order of attachment was made by said Court on April 13, 1973; that said application was made ex parte under the authority of the said Article 62 in order to prevent dissipation of the fund by any claimant to the detriment of others; and except as herein alleged, Curtis denies the allegations contained in said paragraph of the complaint. The order of attachment and the papers in support thereof, including the verified complaint, are annexed hereto as Appendix A.

11. With respect to paragraph 27 of the complaint, Curtis repeats and realleges the allegations contained in paragraph 10 of this answer, admits the title of the action set forth in said paragraph of the complaint and the index number thereof; denies that Curtis made the contention claimed in said paragraph of the complaint in the language quoted therein, albeit said language does appear as a recitation in the order of attachment issued by the Court; and except as herein alleged, denies the allegations of said paragraph of the complaint.

12. With respect to paragraph 28 of the complaint, denies that Curtis made the contentions in the language quoted in said paragraph of the complaint, albeit such lan-

guage, in substance, is contained in the order of attachment made by said Court, excluding the Civil Practice Law and Rules sections set forth in brackets in said paragraph of the complaint.

13. With respect to paragraph 29 of the complaint, admits that Curtis submitted the undertaking of Continental Casualty in the amount set forth; admits that the language quoted in said paragraph of said complaint is, in substance, contained in the order of attachment made by the Court; and except as herein alleged, denies the allegations of said paragraph of the complaint.

14. With respect to paragraph 30 of said complaint, repeats and realleges the allegations contained in paragraph 10 of this answer; admits that on April 13, 1973, Mr. Justice Fine, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, signed the order of attachment; admits that the said order, *inter alia,* contained, in substance, the language quoted in said paragraph of the complaint, and except as herein alleged, denies the allegations of said paragraph of the complaint.

15. With respect to the allegations contained in paragraph 31 of the complaint, repeats and realleges the allegations contained in paragraph 10 of this answer, upon information and belief, admits that on or about April 16, 1973, one of the deputies of the sheriff served a copy of the order of attachment upon National Sports; respectfully refers the Court to the legal effect of said service; and except as herein alleged, denies the allegations contained in said paragraph of the complaint.

16. With respect to paragraph 32 of the complaint, on information and belief, admits that on or about April 26, 1973 National Sports served a Garnishee Statement pur-

suant to Section 6219 of the Civil Practice Law and Rules upon the sheriff and respectfully refers the Court to the contents thereof; on information and belief, admits that National Sports paid over to the sheriff the sum of $9,323.54; on information and belief admits that said Garnishee Statement, *inter alia,* contains, in substance, the language quoted in said paragraph 32 of the complaint; and except as herein alleged, on information and belief, denies the allegations contained in said paragraph of the complaint.

17. With respect to paragraph 33 of the complaint, on information and belief, admits that National Sports made payment to the sheriff of $200 on May 2, 1973 and, on information and belief, denies the remaining allegations of said paragraph of the complaint.

18. With respect to paragraph 34 of the complaint, admits on information and belief that National Sports made payment to the sheriff of $124.17 on May 16, 1973 and, on information and belief, denies the remaining allegations contained in said paragraph of the complaint.

19. Denies the allegations contained in paragraphs 35 and 36 of the complaint.

20. With respect to paragraph 37 of the complaint, repeats and realleges the allegations contained in paragraph 19 of this answer and denies that any action was necessary as alleged in said paragraph 37 of the complaint.

21. With respect to paragraph 38 of the complaint, denies knowledge or information sufficient to form a belief whether the purported agreement required National Sports to make any payment on May 28, 1973; denies the legality of the purported agreement; and, on information and be-

lief, denies that any refusal by National Sports to make payment resulted from the order of attachment or the sheriff's levy.

22. With respect to paragraph 39 of the complaint, on information and belief, admits the sheriff served another copy of said order of attachment upon National Sports on September 24, 1973; on information and belief, admits that the sheriff had already taken into possession certain monies pursuant to the order of attachment but denies knowledge or information sufficient to form a belief with respect to the exact amount that the sheriff took into possession; and except as herein alleged, denies the allegations contained in said paragraph of the complaint.

23. With respect to the allegations contained in paragraph 40 of the complaint, denies that 6214(b) of the Civil Practice Law and Rules of the State of New York has the effect attributed to it in said paragraph of the complaint and respectfully refers the Court to the contents of such section; and denies the remaining allegations contained in said paragraph of the complaint.

24. With respect to the allegations contained in paragraph 41 of the complaint, admits that on or about December 4, 1973, Curtis hade an ex parte application for an order extending the time of National Sports to March 24, 1974 to pay, transfer or deliver property covered by the order of attachment in its possession or control pursuant to 6214(b) of the Civil Practice Law and Rules of the State of New York; admits that the attorneys for the defendants in said action in the Supreme Court of the State of New York appeared in such action on April 18, 1973, and interposed their answer on April 27, 1973; admits that the action was then pending in the Supreme Court of the State of

New York, County of Westchester; and except as herein alleged, denies the allegations of said paragraph of the complaint.

25. With respect to paragraph 42 of the complaint, admits that on or about December 7, 1973, an ex parte order was signed by Mr. Justice Beisheim, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, granting the relief requested by Curtis; admits that such order contained, in substance, the language quoted in said paragraph of the complaint; and, except as herein alleged, denies the allegations contained in said paragraph of the complaint.

26. Denies the allegations contained in paragraphs 43, 44, 45, 46, 47, 48, 49 and 50 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

27. There is a prior action pending in the Supreme Court of the State of New York referred to in these pleadings, to which Curtis and the plaintiffs are parties.

28. In said prior action and pursuant to the laws of the State of New York, and particularly Article 62 of the Civil Practice Law and Rules, the plaintiff can summarily obtain the relief they seek in this action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

29. Plaintiffs have an adequate remedy at law which they can summarily obtain in said pending prior action pursuant to the laws of the State of New York and particularly Article 62 of the Civil Practice Law and Rules.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

30. The complaint fails to state a claim upon which relief can be granted by this Court.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

31. The Court lacks jurisdiction over the subject matter contained in the complaint and cannot grant the relief sought therein, *inter alia,* on grounds of well settled principles of equity, comity and federalism.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

32. On information and belief, the plaintiffs come before this Court seeking equitable relief with unclean hands having entered into a conspiracy to defraud the defendant Curtis from its just claim against Champion by joining in a scheme to deprive Champion of assets held by it as trustee for its creditors among whom is Curtis.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

33. On information and belief, the plaintiffs have no interest in or valid claim to the property taken into possession by the Sheriff of the County of New York pursuant to the order of attachment issued in said state action and have no standing to sue as persons allegedly deprived of property without due process under the Fourteenth Amendment to the Constitution of the United States.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

34. Subdivisions (4), (5) and (8) of Section 621 of the New York Civil Practice Law and Rules, each of which sub-

divisions was the basis upon which the Supreme Court of the State of New York issued said order of attachment, provide for the attachment of property upon circumstances, each of which are wholly consistent with due process of law pursuant to the Fourteenth Amendment to the United States Constitution.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

35. Plaintiffs are estopped from challenging the validity of said attachment by virtue of diverse affirmative acts taken by them in said pending state action including, *inter alia,* a motion to consolidate said action with another action pending in Westchester County and for change of venue of said consolidated action to Westchester County and the noticing and taking of the deposition of the defendant Curtis, without challenging the validity or propriety of said order of attachment in said pending state action.

36. The said state action has been pending for ten months, during which time plaintiffs have failed to challenge or move to vacate said attachment.

37. On information and belief, during said ten month period other creditors of Champion have made claims against Champion.

38. On information and belief, if plaintiffs had timely moved to vacate said order of attachment in said state action, and if the motion had been granted, defendant Curtis would have had an opportunity to obtain a new order of attachment on notice which order of attachment would have had priority over the claims of other creditors of Champion.

39. On information and belief, if the present order of attachment is vacated, or enforcement thereof enjoined,

other creditors of Champion may obtain an order of attachment which will have priority over any order of attachment which defendant Curtis would be able to obtain.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

40. Defendant Curtis repeats and realleges the allegations contained in paragraphs 35 through 39, inclusive, of this answer.

41. Plaintiffs have waived any and all rights which they might otherwise have had to challenge the validity of said order of attachment.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

42. Defendant Curtis repeats and realleges the allegations contained in paragraphs 35 through 39, inclusive, of this answer.

43. Plaintiffs have been guilty of laches.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

44. On information and belief, prior to the commencement of the State action by Curtis and the issuance of the order of attachment therein, the defendant National, upon being apprised of the Curtis claim, refused to make payment to the plaintiffs pursuant to the purported agreement set forth in the complaint and assumed the position of a stakeholder with respect to such payments.

45. Thereafter, on March 5, 1973, and still prior to the commencement of the State action by Curtis and the issuance of the order of attachment therein, Wrestling

commenced an action in the Supreme Court of the State of New York, County of Westchester, against National, *inter alia,* to recover such monies from National.

46. It was only after such refusal by National to make such payments and the institution of such action by Wrestling against National to collect such payments, that Curtis instituted its State action wherein the order of attachment was issued.

47. Thus, at the time the order of attachment issued, the plaintiffs could not have obtained possession of said monies, in any event, unless and until they obtained a favorable judicial determination of their claim, by virtue of National's prior decision to retain such monies as stakeholder until such determination.

48. By virtue of the foregoing, the order of attachment was surplusage in terms of the plaintiffs' rights to possession of such monies, as National had made a prior determination to withhold such monies until a judicial determination and had the attachment not issued, National would have retained such monies as stakeholder until such determination.

49. In view of National's prior determination to retain such monies as stakeholder, any vacation of the attachment would require a return of such monies to National as such stakeholder, and not to plaintiffs, thereby rendering the issues raised in this action moot; National's answer in this action demands alternatively the return of the monies paid over by National and presently held by the Sheriff.

50. By virtue of the foregoing, the order of attachment did not deprive the plaintiffs of any property.

Answer (Curtis Circulation Company).

51. The New York Supreme Court action brought by Wrestling against National in Westchester County recognizes and acknowledges that plaintiffs had no immediate right to possession of said monies and could only obtain that right by a judicial determinatoin in said action.

52. Plaintiffs further acknowledged that such a judicial determination in turn requires a determination of the Curtis claim in such monies as evidenced by a motion made by Wrestling in said pending State action in Westchester County on May 8, 1973, in which Wrestling moved to consolidate its action against National in Westchester County with the Curtis action (which motion for consolidation was granted on September 25, 1973).

53. In its motion papers on said motion for consolidation, Wrestling asserted to the Court:

> "Thus, the primary issue of law and fact presented to the Court in the action brought by Wrestling against National relates to its right of offset for the claim asserted by Curtis. . . ."

54. By virtue of the foregoing, the plaintiffs would have had no right to possession of said monies, whether an order of attachment issued or not, unless and until they obtained a favorable determination in the pending State Court actions of their claims therein made.

WHEREFORE, defendant Curtis demands judgment dismissing the complaint together with the costs and disbursements of this action.

Dated: New York, New York, January 31, 1974.

PHILIP H. BUSNER
of the firm of
YOUNG, SONNENFELD & BUSNER
Attorneys for Defendant
Curtis Circulation Company

Order of Attachment.

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, Borough of Manhattan, City, County and State of New York, on the 13th day of April, 1973.

Present: HON. SIDNEY A. FINE, Justice.

Index No. 6102—73

CURTIS CIRCULATION COMPANY,

Plaintiff,

against

CHAMPION SPORTS PUBLICATIONS, INC., and WRESTLING REVUE, INC., and BERT RANDOLPH SUGAR,

Defendants.

A motion having been made by the plaintiff for an order of attachment against the property of the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, in the within action in this Court,

Now, on reading and filing the summons and verified complaint herein, the affidavit of Stuart J. Freedman, sworn to the 29 day of March, 1973, wherein it appears that a cause of action for a money judgment exists in favor of the plaintiff against the defendants jointly and severally in the sum of $28,588.08, as well as for other sums, together with interest and costs thereon, and that the plaintiff is

entitled to recover said sum of $28,588.08 over and above all counterclaims known to it;

And it being further shown by said affidavit that the plaintiff is entitled to an order of attachment against the property of the defendants on the ground that the defendant Champion Sports Publications, Inc. has assigned, disposed of or removed property from the State with intent to defraud its creditors; that the defendant Champion Sports Publications, Inc. and its principal officer, the defendant Bert Randolph Sugar, have been guilty of a fraud in contracting or incurring a liability upon an express contract; the defendants Champion Sports Publications, Inc., Bert Randolph Sugar and Wrestling Revue, Inc. are liable to the plaintiff for damages in a cause of action for fraud and deceit; and the plaintiff has submitted the undertaking required by law herewith;

Now, on motion of Young, Sonnenfeld & Busner, attorneys for the plaintiff, it is

ORDERED, that the plaintiff's undertaking be and the same is hereby fixed in the sum of $10,000, of which amount the sum of $8,578 thereof is conditioned that the plaintiff will pay to the defendants Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar all legal costs and damages which may be sustained by reason of the attachment if the said defendants recover judgment or it is finally decided that the plaintiff was not entitled to an attachment of the defendants' property, and the balance thereof conditioned that the plaintiff will pay the Sheriff all of his allowable fees, and it is further

ORDERED that the Sheriff of the City of New York or the Sheriff of any county in the State of New York levy within his jurisdiction, at any time before final judgment, upon

such property in which said defendants Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar have an interest and upon such debts owing to said defendants as will satisfy the plaintiff's demand of $28,588.08, together with probable interest costs and Sheriff's fees and expenses and that he proceed hereon in the manner required by law.

Enter within ten days

SAF
J.S.C.

Affidavit of Stuart J. Freedman, in Support of Application for an Order of Attachment.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

STUART J. FREEDMAN, being duly sworn, deposes and says:

1. Your deponent is Corporate Secretary of the plaintiff in the above entitled action and makes this affidavit in support of an application for an order of attachment pursuant to CPLR § 6201(4)(5) and (7) against the defendants jointly and severally on the grounds that said defendants have committed frauds upon the plaintiff as alleged in the verified complaint annexed hereto and made part hereof.

2. The plaintiff is a Delaware corporation engaged in the business of distributing publications in the State of New York and elsewhere and did enter into a Distribution Agreement in August 1971 to distribute publications owned and published by the defendant Champion Sports Publishing Inc. (hereinafter referred to as "Champion").

3. Said Distribution Agreement provided for payment of advances to Champion and these advances were secured by the following quoted provision contained in the Distribution Agreement:

> "If, for any reason, Curtis makes an over payment to Publisher on any one publication or issue it distributes for Publisher, such over payment may be deducted by Curtis from any subsequent payment due on any publication or issue which Curtis may distribute for Publisher."

A true copy of the Distribution Agreement is Exhibit 1 to the complaint, a copy of which complaint is annexed hereto.

4. Pursuant to the Distribution Agreement, the plaintiff between August 1971 and December 1972 had advanced sums of money to Champion well in excess of $100,000 and did distribute the publications of the defendant Champion.

5. The next succeeding paragraphs 6, 7 and 8 are alleged upon information and belief. The basis for such information and belief is set forth in paragraph 10 below.

6. The defendant, Bert Randolph Sugar (hereinafter referred to as "Sugar"), who was the principal shareholder and officer of defendant Champion, caused the defendant Champion and another corporation owned and controlled by Sugar, Wrestling Revue, Inc. (hereinafter referred to as "Wrestling"), to embark upon a course of

action in November 1972 for the purpose of defrauding the plaintiff of its rights under the Distribution Agreement and of its rights as a creditor for moneys due to the plaintiff from Champion by reason of advances made by plaintiff to Champion.

7. Pursuant to the plan and course of action, the defendants Sugar, Champion and Wrestling caused six of the publications that were subject to the Distribution Agreement to be transferred by Champion for no consideration to the defendant Wrestling in November 1972. Wrestling then sold the six publications to an independent third party for a valuable consideration and none of this consideration was paid to the defendant Champion.

8. The transfer of the six publications by Champion was accomplished through an alleged license agreement between Champion and Wrestling. The license agreement was supposedly created in 1971, prior to the date that plaintiff entered into the Distribution Agreement with Champion. Under the license agreement, Wrestling granted to Champion the right to publish various periodicals created by the defendant Sugar. In the event that certain royalties were not paid then Wrestling had the right to terminate the license arrangement. Wrestling, in order to make the sale of the six publications, terminated the license agreement with Champion on the ground that Champion had not paid its license fees.

9. It is believed that the license agreement between Champion and Wrestling was either a contrivance that did not exist prior to November 1972 or if the license agreement did exist prior to that time, then the defendants had deliberately and fraudulently concealed such licensing arrangement from the plaintiff until recently when the plaintiff learned of the circumstances pertaining to the sale of

the six publications by Wrestling to the independent third party known as National Sports Publishing Corporation (hereinafter referred to as "National"). If the license agreement was first created in November 1972, its purpose was to defraud the rights of the plaintiff as a creditor and to avoid the Distribution Agreement. If the license agreement was in fact in existence prior to November 1972 and prior to August 1971, then such license agreement of necessity would have been required to be disclosed to the plaintiff by the defendants and their failure to disclose was a fraud upon the plaintiff. The defendants should now be estopped from asserting such a license arrangement. Plaintiff as a distributor entered into the Distribution Agreement in August 1971 on the premise that it had an exclusive arrangement to distribute the publications and that it would be able to recoup its large advances from Champion of future publication distributions.

10. The basis for the statements set forth in paragraphs 6, 7 and 8 above are as follows:

(a) National, the firm that purchased the six publications, advised plaintiff of the alleged license agreement when your deponent and plaintiff's counsel met with an officer and the attorneys for National on March 2, 1973. At this meeting, National's representatives stated there was a license agreement between Wrestling and Champion. They, however, did not produce copies for your deponent or his attorney to review.

(b) National's representatives at this meeting of March 2, 1973 also indicated that all moneys and other considerations were paid either to Wrestling or Sugar and nothing went to Champion.

(c) Defendant Champion in or about October 1972 granted a security interest in two of Champion's more successful publications entitled "Wrestling Monthly" and

"Boxing Illustrated" to Champion's printer, Montreal Offset Press (hereinafter referred to as "Montreal") to secure Champion's indebtedness to Montreal for printing costs. According to information received in February and March 1973 from Montreal's officers and attorneys and from the officers and attorneys of Montreal's parent company, Quebecor Ltd., Champion assigned all of its rights to the two publications to Quebecor Ltd. in the latter part of January 1973 in cancellation of the indebtedness to Montreal for printing costs.

(d) Plaintiff has been unable to locate any other assets and knows of no other viable assets of Champion other than the six publications that were assigned to National and the two publications that were assigned to Montreal's parent company, Quebecor.

11. As of February 28, 1973 the plaintiff has made advance payments to Champion of which the sum of $28,588.08 has not been recouped by the plaintiff from the distribution of publications by the defendant Champion. Annexed hereto and made part hereof as Exhibit 2 is a schedule of all payments made and not recouped through February 28, 1973 prepared by the Treasurer of the plaintiff. It is for this amount that an order of attachment is now being sought. In addition there are other damages which at the present time have not been liquidated, as alleged in the *ad damnum* clause to the complaint. The plaintiff reserves the right to apply for a further attachment for additional sums upon liquidation of those claims.

12. It is thus seen from the allegations in the complaint that defendants have committed the following acts entitling the plaintiff to an attachment under § 6201(4)(5) and (7):

(a) as principal officer and stockholder of defendant Champion, defendant Sugar wrongfully allowed the plain-

Affidavit of Stuart J. Freedman, in Support of Application for an Order of Attachment.

tiff to enter into a contract with defendant Champion while fraudulently failing to disclose the existence of a license agreement with defendant Wrestling if same in fact did exist and personally affirmatively misrepresenting defendant Champion's ownership rights in the publications that were the subject of and purpose of the Distribution Agreement;

(b) If the license agreement did not in fact exist prior to November 1972, then the defendants fraudulently contrived such a license arrangement to deprive plaintiff of its rights under the Distribution Agreement with Champion;

(c) the transfer of the only valuable assets of defendant Champion to defendant Wrestling without payment of present valuable consideration for purposes of defrauding plaintiff of its rights as a creditor is in violation of Article 10 of the Debtor and Creditor Law of New York.

13. No previous application has been made for the relief requested herein.

WHEREFORE, your deponent prays for an order of attachment against the assets of each of the defendants in the form annexed hereto.

Sworn to before me this
29 day of March, 1973.

STUART J. FREEDMAN

ARTHUR SCHEIUER
Notary Public, State of New York

No. (illegible)
Qualified in Queens County
Commission Expires March 30, 1974

Verified Complaint.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

The plaintiffs, Curtis Circulation Company, complaining of the defendants by its attorneys, Young, Sonnenfeld & Busner, alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS

1. At all times hereinafter mentioned, plaintiff is and was a corporation duly organized under the laws of the State of Delaware, having offices in the City, County, and State of New York, and engaged in the business of distributing publications in this State and in various states of the United States.

2. Upon information and belief, at all times hereinafter mentioned, defendant Champion Sports Publications, Inc. (hereinafter referred to as "Champion") is a New York corporation having its place of business in Pleasantville, New York, and engaged in the business of publishing magazines, newspapers and periodicals whose subject matter pertains to sports and directed towards a readership interested in sports. The following are titles of some of the magazines, newspapers and periodicals published by Champion:

The Basketball News
Basketball's Best (Pro and College)
Gridiron
Gridiron Year Books (Pro and College)
Who's Who in Pro Football

Verified Complaint.

Who's Who in Pro Basketball
Wrestling Monthly
Boxing Illustrated

3. Upon information and belief, at all times hereinafter mentioned, defendant Wrestling Revue, Inc. (hereinafter referred to as "Wrestling") is a corporation organized under the laws of the State of New York, whose place of business is unknown to plaintiff.

4. Upon information and belief, the individual defendant Bert Randolph Sugar (hereinafter referred to as "Sugar") is the principal stockholder, directly or indirectly, of defendants Champion and Wrestling and is the principal officer of defendants Champion and Wrestling.

5. In August 1971, plaintiff and defendant Champion entered into a contract denominated "Single Copy Distribution Agreement," a true copy of which agreement is annexed hereto and made part hereof as Exhibit 1 (and hereinafter referred to as "Distribution Agreement").

6. Under the terms of the Distribution Agreement, defendant Champion granted to plaintiff the exclusive right for a period of five years to distribute the publications listed in a separate memorandum agreement that the plaintiff and defendant Champion had agreed and executed, and such other publications as the parties should mutually agree to be covered by said Distribution Agreement in separate memoranda agreements.

7. Pursuant to the terms of the Distribution Agreement, in or about September 1971, plaintiff began distributing the publications covered thereunder and made advances of money to defendant Champion as well as other payments, as provided in said Distribution Agreement.

Verified Complaint.

8. By September 1972, plaintiff had advanced sums in excess of $100,000 to Champion, which moneys were not recouped from the distribution made pursuant to the Distribution Agreement.

9. Under the terms of the Distribution Agreement plaintiff had an absolute right of reimbursement for advances made with reimbursement assured to plaintiff not only by Champion's contractual obligation but also secured by plaintiff's right to apply proceeds from any future distribution of Champion's publications.

10. Upon information and belief, sometime in November 1972 defendant Sugar in concert with the other defendants Champion and Wrestling for the purpose of avoiding Champion's liability to plaintiff under the Distribution Agreement embarked upon the following plan and course of action in contravention to the rights of the plaintiff under the Distribution Agreement:

(a) Upon information and belief, defendant Sugar contrived a license agreement between defendant Wrestling, as licensor, and defendant Champion, as licensee, with respect to the following publications:

Basketball News
Basketball's Best (Pro and College)
Gridiron
Gridiron Year Books (Pro and College)
Who's Who in Pro Football
Who's Who in Pro Basketball

All of the foregoing six publications were subject to and part of the Distribution Agreement. (For convenience the said six publications shall hereinafter be referred to collectively as "the six publications.")

(b) Upon information and belief, under the terms of this contrived license agreement pertaining to the six publica-

tions, the defendant Sugar caused defendant Champion to be in default thereunder so that defendant Wrestling could claim the right to reacquire the said six publications.

(c) Upon information and belief, defendant Wrestling thereafter entered into an agreement to sell, transfer and assign the said six publications to a company independent of defendants known as National Sports Publishing Corporation (hereinafter referred to as "National"), whereby defendants Wrestling and Sugar would receive cash moneys from National with no payments being made to Champion.

(d) Upon information and belief, under the terms of the agreement between Wrestling and National, National did not assume any of the obligations with respect to moneys due and owing by Champion to plaintiff under the Distribution Agreement.

(e) Upon information and belief, defendants Sugar and Champion agreed to allow Champion's printer, Montreal Offset Press (hereinafter referred to as "Montreal") to acquire two other publications, the subject of and part of the Distribution Agreement, namely, Wrestling Monthly and Boxing Illustrated, in consideration for cancellation of all indebtedness of Champion to Montreal.

(f) The effect of the above plan and course of action was to leave the defendant Champion without any assets whatsoever to satisfy its liabilities.

11. Upon information and belief, sometime in November 1972, Montreal, through a subsidiary or affiliate, assumed ownership of the two publications, Wrestling Monthly and Boxing Illustrated, and has taken the position that neither Montreal nor the two publications transferred to Montreal is or are liable to plaintiff for unrecouped distribution advances or are subject to the Distribution Agreement.

12. Upon information and belief, in December 1972, National assumed ownership of the six publications ostensibly transferred to it by defendant Wrestling and National has taken the position that none of the said six publications are subject to the Distribution Agreement nor are the six publications nor National liable to the plaintiff for unrecouped distribution advances.

13. The actions of the defendants, Sugar, Champion and Wrestling, have damaged the plaintiff to the extent of plaintiff's unrecouped advances which at February 28, 1973 were in the sum of $28,588.08 plus a dollar amount not now known for operational subsidies to wholesalers, display allowances to retailers and returns of publications from wholesalers for which plaintiff will be required to reimburse such wholesalers and for which plaintiff is entitled to recoupment from Champion. In addition, plaintiff may be further damaged by the action of the said defendants by reason of Champion's failure to pay freight bills for delivery of such publications and which freight bills are Champion's liability but for which freight bills the freight forwarders are seeking payment from the plaintiff.

14. The actions of the said defendants have also deprived the plaintiff of expected profits under the Distribution Agreement, the amount of which profits the plaintiff requests leave to prove at trial.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS, CHAMPION SPORTS PUBLICATIONS, INC. and BERT RANDOLPH SUGAR

15. Repeats and realleges paragraphs 1 through 14 as if fully set forth herein.

16. If the defendant Wrestling was in fact the licensor of the publications published by Champion, then the defendants Champion and Sugar in failing to disclose such a material fact to the plaintiff committed a fraud upon the plaintiff by failing to disclose such fact and by misrepresenting that Champion was in fact the owner and publisher of said publications exclusively.

17. The plaintiff, but for the fraud and deceit alleged in paragraph 16 herein would not have entered into the Distribution Agreement or advance moneys to defendant Champion.

18. By reason of the fraudulent acts of the defendants Champion and Sugar, plaintiff has been damaged as set forth in paragraphs 13 and 14 above.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT, WRESTLING REVUE, INC.

19. Repeats and realleges paragraphs 1 through 14 as if fully set forth herein.

20. As stated aforesaid at paragraph 4, upon information and belief, defendant Sugar is the principal stockholder and principal officer of defendant Wrestling and by reason of such position of defendant Sugar, defendant Wrestling knew of the Distribution Agreement between plaintiff and defendant Champion, and defendant Wrestling caused or allowed Champion and Sugar to perpetrate the fraudulent acts upon the plaintiff, as alleged in the first and second causes of action.

21. By reason thereof, plaintiff has been damaged by defendant Wrestling as set forth in paragraphs 13 and 14 above.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT, CHAMPION SPORTS PUBLICATIONS, INC.

22. Repeats and realleges paragraphs 1 through 14 as if fully set forth herein.

23. Defendant Champion has breached its Distribution Agreement with plaintiff, to the damage of the plaintiff as set forth in paragraphs 13 and 14 above.
paragraphs 13 and 14 above.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST THE DEFENDANTS, WRESTLING REVUE, INC. AND BERT RANDOLPH SUGAR

24. Repeats and realleges paragraphs 1 through 14 and 23 as if fully set forth herein.

25. Defendants Wrestling and Sugar for the purpose of defrauding the plaintiff did cause defendant Champion to wrongfully breach its Distribution Agreement with plaintiff, to the damage of the plaintiff as set forth in paragraphs 1 3and 14 above.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS

26. Repeats and realleges paragraphs 1 through 14 as if fully set forth herein.

27. Upon information and belief, defendant Champion in November 1972 and since that time has been unable to pay its debts as they mature and its liabilities far exceed its assets.

28. The actions of the defendants, as alleged in paragraph 10 above with respect to the six publications, was a transfer and assignment by Champion of its assets to de-

Verified Complaint.

fendant Wrestling without the payment of good and valuable present consideration in violation of the Debtor-Creditor Laws of the State of New York.

29. By reason of the foregoing, the plaintiff has been damaged as set forth in paragraphs 13 and 14 above.

WHEREFORE, plaintiff prays for judgment jointly and severally against the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, as follows:

(a) that plaintiff recover from the defendants jointly and severally the sum of $28,588.08 together with interest from February 28, 1973;

(b) that plaintiff recover from the defendants jointly and severally reimbursement for returns made by plaintiff to wholesalers from February 28, 1973 to date of trial, together with interest;

(c) that plaintiff recover from the defendants jointly and severally lost profits, as alleged in paragraph 14 above;

(d) the defendants be made to account to plaintiff for any benefits received under the assignment made to National and Montreal;

(e) the defendants be required to pay punitive damages to plaintiff;

(f) the defendants be required to pay the costs and disbursements of this action; and

(g) such other and further relief as may be just and proper in the premises.

YOUNG, SONNENFELD & BUSNER
Attorney for Plaintiff

(Verified by Stuart J. Friedman, March 29, 1973.)

Curtis Circulation Company

SINGLE COPY DISTRIBUTION AGREEMENT

Between CURTIS CIRCULATION COMPANY, 841 Chestnut Street, Philadelphia, Pa. 19107 (hereinafter called "Curtis"), and _____
CHAMPION SPORTS, INC.

having its principal place of business at 505 Park Avenue, New York, N. Y.
(hereinafter called "Publisher"), whereby Curtis will handle exclusively the United States and Canadian and foreign distribution of
Titles Mutually Agreed to (hereinafter called "Publication").

This Agreement shall become effective with issues dated 1971. Publisher warrants its ability and authority to deliver to Curtis, without liens or encumbrances, sufficient copies of Publication in salable condition to comply with the terms contained herein. The parties anticipate that Publication shall be issued _____.

Publication shall conform substantially to the specimen copy or outline of specifications submitted or shall have the following specifications:

As submitted

It is agreed that each copy of Publication will be clearly marked with a cover _____. The newsstand print order for initial distribution will be _____ as mutually agreed. All copies of Publication shall be fully returnable. Publisher hereby authorizes Curtis to adjust claims made by any of its wholesalers for delivery shortages and agrees to reimburse Curtis for any shortage allowances for Publication Curtis makes to its wholesalers.

Publisher shall be responsible for shipping and traffic costs of each issue, including import and other duties, to wholesalers, in the quantities as specified on the galley which, with publisher's cooperation, Curtis shall supply to Publisher sufficiently in advance so that shipments can be prepared and shipped to arrive at all wholesalers' warehouses approximately ten (10) days prior to established on-sale date. If Publisher requires, Curtis will supply prepared labels with Publisher's galley at an initial charge of Thirty-five dollars ($35.00) for plate preparation plus two cents (2c) per label for each label supplied. Any cost incurred for reshipping copies while Publication is on-sale will be borne by Publisher. Publisher will accept front covers, headings or wholesaler's certified statements as the basis for the adjustment of unsold copies and Curtis shall make no charge for servicing unsold copies covered by such acceptance. Should Publisher require whole copy returns, notice of the quantities desired and full return address must be supplied to Curtis at least fifteen (15) days prior to off-sale date. Curtis will use its best efforts to comply with Publisher's request for whole copy returns for which Publisher shall pay Curtis two cents (2c) per copy and prepay all freight and shipping charges. Publisher shall bear the risk of loss of whole copy returns while they are in Curtis' possession or in transit. Publisher shall keep all returned whole copies from entering the stream of commerce for at least 180 days after off-sale date.

Curtis shall calculate the individual town allotments and shall use its best efforts to assure the proper allotment of copies by wholesalers to those retail outlets which appear to Curtis to have the best potential for sale of Publication.

Curtis shall pay Publisher for Publication at the rate of 50% of cover price for each copy of Publication sold. For all copies distributed to: New York-Northeastern New Jersey Consolidated Metropolitan area; Stamford and Waterbury, Connecticut; Chicago and Addison, Illinois; Boston, Massachusetts; Philadelphia, Pennsylvania; and other high-cost wholesaler areas* Curtis will bill Publisher and Publisher agrees to pay Curtis 10 per copy as Publisher's share of the extra labor and handling costs incurred in these areas. Payment to Publisher for copies of Publication sold in Canada will be in Canadian funds or in United States funds of equivalent value. * and agreed to mutually.

Curtis will make payment for 70 % of estimated net sale to Publisher 52 days after on-sale date, with a second payment, if any, as shall be necessary to provide settlement for 90 % of the then estimated net sale 90 days after off-sale date. A third payment, if necessary, for 100% of the then estimated net sale will be made to Publisher 180 days after off-sale date. Final settlement will be made 360 days after off-sale date. If, for any reason, Curtis makes an over payment to Publisher on any one publication or issue it distributes for Publisher, such over payment may be deducted by Curtis from any subsequent payments due on any publication or issue which Curtis may distribute for Publisher. The return limit date for the wholesaler to make returns of Publication is 180 days after off-sale date; however, Publisher agrees to credit Curtis, at the same rate Curtis paid Publisher, for all unsold copies (whole copies, front covers, headings or returns evidenced by certified statement) for which Curtis gives credit to wholesalers, up to and beyond this time limit.

Publication will remain on-sale for a period of As Agreed days. Curtis shall provide Publisher with an estimate of final sale approximately 35 days after on-sale date. Curtis shall also provide Publisher an estimate of final sale, based upon returns received from wholesalers, approximately 90 days after off-sale date.

At no cost to Publisher, Curtis shall give space as it deems reasonable in its house organs and/or bulletins for the promotion of Publication. The cost of all special promotions authorized by Publisher shall be borne by Publisher.

Publisher agrees, at all times hereafter, to indemnify Curtis against all liability, loss, damage or expense of any kind which Curtis may incur by reason of any action, suit or proceedings that may be brought against Curtis or any of its wholesalers, employees or agents as a result of or based upon any material contained in Publication or in any promotional material relative thereto which Publisher furnishes Curtis and any trademark or copyright infringement resulting or allegedly resulting from Publication or said promotional material including, in all cases, the reasonable cost of attorneys' fees, expenses and disbursements.

This Agreement is not assignable or transferrable in whole or in part by either party without the written consent of the other. The term of t
agreement shall be for five years and, unless six months notice to terminate is given by one party to the other prior to the end of the initial five y
period, this contract shall be automatically extended for another five years, with the same termination and renewals to apply. It may be terminat
immediately by Curtis upon notice to Publisher should Publication, in the sole judgment of Curtis, be deemed to be libelous, obscene or indecent.

This Agreement sets forth the entire understanding of the parties, supersedes all previous agreements relating to the subject matter hereof, m
not be amended except in a writing signed by the parties and is binding upon the parties, their respective heirs, executors, administrators successors a
assigns. It has been signed in two counterparts, both of which shall be deemed to be originals.

+ Curtis will pay for each title ~~by the~~ 30th of the month followin
on sales date for 25% of the number of copies shipped for Curtis.
This amount of money will be deducted for the scheduled first
payment of 70% of estimated sale due 52 days after on sale date.
Curtis will pay carrier and charge to Publisher's account.

B R Sugar
Publisher

By _____

Title _____

CURTIS CIRCULATION COMPANY

By Robert B. Allegra

Title V.P. - Mktg.

ATTACHMENT:

CURTIS CIRCULATION COMPANY
SINGLE COPY DISTRIBUTION AGREEMENT

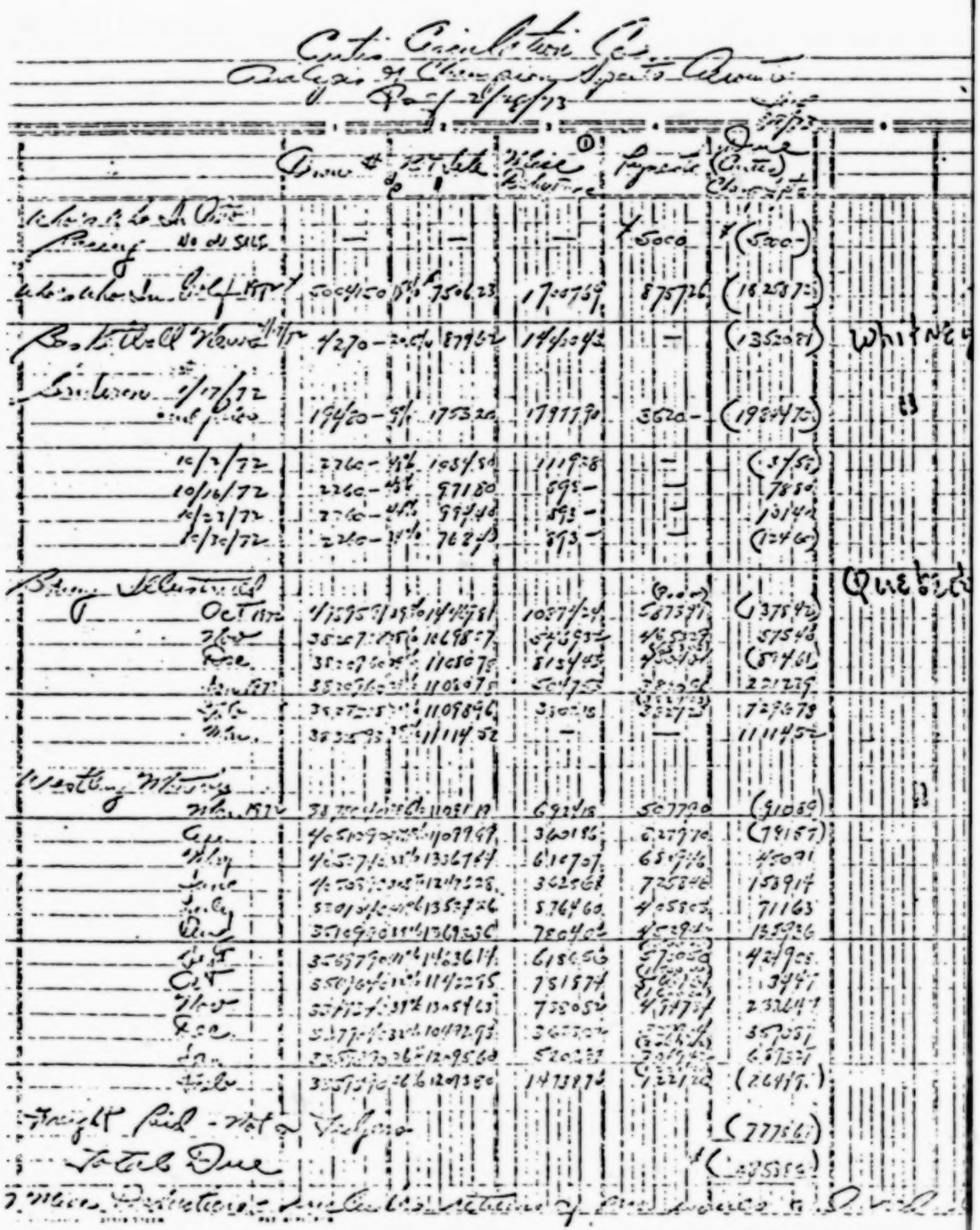
RE: CHAMPION SPORTS PUBLISHING CO.
505 PARK AVENUE
NEW YORK, N. Y.

PUBLICATIONS	CURTIS RATE
Boxing Ill. (April 1972)	50% off cover
Wrestling Monthly (Oct. 1971)	50% off cover
Gridiron Newspaper (Sept. 12, 1971)	50% & 60% off cover*
The Basketball News (Nov. 12, 1971)	50% & 60% off cover*
Who's Who in Golf (1971)	50% off cover
Who's Who in Auto Racing	
Gridiron Pro Annual	
Gridiron College Annual	
NFL Scouting Reports	

* Curtis discounts of 50% and 60% off cover will be determined on a selected basis where necessary to secure distribution.

CURTIS CIRCULATION COMPANY
By s/ G. M. McCOMB
Title President

s/ B. R. SUGAR
PUBLISHER



Notice of Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Fred I. Sonnenfeld, Esq., sworn to February 11, 1974, and upon the complaint filed herein, the undersigned will move before the Honorable Morris E. Lasker, a Judge of this Court, at Room 619, United States Courthouse, Foley Square, City, County and State of New York, on the 6th day of March, 1974, at 10 A. M. of that day or as soon thereafter as counsel can be heard, for an order seeking the following relief:

1. To dismiss the action on the ground that the plaintiffs do not have standing to bring the within action in that they have not been deprived of any property right by State action, in violation of the Fourteenth Amendment to the United States Constitution;

2. To dismiss the action on the ground that the plaintiffs have commenced a prior action in the New York Supreme Court, Westchester County, which is presently pending and that the relief sought in this action by the plaintiffs is identical to the relief sought in said prior pending action.

3. To dismiss the action on the ground that plaintiffs have waived any right which they may have had to challenge the constitutionality of the New York State attachment statute, Article 62 of the Civil Practice Law and Rules, by their election in the State Courts to have the re-

spective interests of the parties making claim to the property in question resolved in a plenary trial in a consolidated action involving all of such parties;

4. To dismiss the complaint on the ground that the constitutional issue raised in this action can be raised by the plaintiffs in a consolidated action now pending in the Courts of the State of New York and the Federal Courts, upon the circumstances of this case, should decline to take jurisdiction over the constitutional issue allegedly presented; or, in the alternative,

5. For a stay of further proceedings in this action pending the rendition of the decision by the United States Supreme Court in an action now pending before it, *Mitchell* v. *W. T. Grant Co.*, which decision may be dispositive of the constitutional issue raised in this action; and

6. For such other and further relief as may be just and proper, including the granting of costs.

PLEASE TAKE FURTHER NOTICE that answering affidavits and memoranda of law, if any, are required to be submitted to the undersigned at least five (5) days prior to the return date hereof.

Dated: New York, New York, February 11, 1974.

Yours, etc.,

YOUNG, SONNENFELD & BUSNER
Attorneys for Defendant

To:

LEVY AND LEDES, Esqs.
Attorneys for Plaintiffs

GILBERT, SEGALL & YOUNG, Esqs.
Attorneys for Defendant

JOHN J. MCCLOSKEY, Sheriff of the City of New York, Defendant

HON. MALCOLM WILSON, Governor of the State of New York, Defendant

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York
Attorney for Justices Fine and Beisheim and himself

CONTINENTAL CASUALTY COMPANY
Defendant

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FRED I. SONNENFELD, being duly sworn, deposes and says:

1. Your deponent is an attorney at law duly licensed to practice in all the Courts of the State of New York, including this Court; is a member of the firm of Young, Sonnenfeld & Busner, attorneys for defendant Curtis Circulation Company, and is fully familiar with the facts and circumstances hereinafter alleged.

2. The within action seeks to enjoin the enforcement of the New York attachment statute, Article 62 of the Civil Practice Law and Rules. Plaintiffs claim that the receipt of certain monies by the Sheriff of the City of New York pursuant to an order of attachment issued under such statute deprived them of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and that said attachment statute, insofar as it permits the issuance of an order of attachment on ex parte application, is unconstitutional by virtue of said amendments to the United States Constitution.

3. Deponent makes this affidavit in support of a motion to dismiss the within action under Rule 12, Federal Rules of Civil Procedure, upon the following grounds:

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

(a) The plaintiffs lack standing to bring the within action as they have been deprived of no property right under the Fifth and Fourteenth Amendments to the United States Constitution by reason of the fact that the plaintiffs have no possessory rights in the monies deposited by the defendant National with the Sheriff, as National had previously retained such monies and had resolved to continue such retention until the underlying claims of the parties were resolved to its satisfaction.

(b) There is a prior action pending in which the plaintiffs are seeking the same relief as they seek in this action, said prior action being an action instituted by the plaintiffs in Supreme Court, Westchester County, under the title of Wrestling Revue, Inc. v. National Sports Publishing Corporation, said relief being the recovery of money damages for breach of contract and artificially denominated by the plaintiffs in this action as the constitutional deprivation of property without due process.

(c) The plaintiffs have waived any right to raise the constitutional issue sought to be raised in this action by virtue of its election in the State Courts to have its rights as well as the rights of Curtis and National determined in a plenary trial in a consolidated action to which the plaintiffs, Curtis and National are all parties, which consolidated action is presently pending in the State Court.

(d) The constitutional issue raised by the plaintiffs in this action can be determined in the pending State consolidated action and upon the circumstances of this case, the Federal Courts should decline to take jurisdiction on general grounds of comity, federalism and equity.

4. In the event the Court should not grant relief pursuant to Rule 12 on any of the foregoing grounds, this

affidavit is made in support of an application for alternative relief, to wit, that further proceedings in this action be stayed pending the rendition of a decision by the United States Supreme Court in the case of *Mitchell* v. *W. T. Grant,* which decision may be dispositive of the constitutional issues raised herein.

I. Facts Preceding the Issuance of the Order of Attachment

5. Some time prior to August 1971, Curtis entered into negotiations with Bert Randolph Sugar to arrange for distribution of certain periodicals which Sugar represented to Curtis were being published by him. As a result of such negotiations, in August 1971, Curtis entered into a written distribution agreement (a copy of which is annexed to the Curtis answer herein in Appendix A thereto) wherein Sugar designated himself and "Champion Sports, Inc." as "Publisher". Since the execution of said written distribution agreement, Sugar and his attorneys have represented that "Champion Sports, Inc." is in reality a corporate entity known as "Champion Sports Publishing, Inc." (hereinafter "Champion").

6. Under the terms of said written distribution agreement, Curtis undertook to distribute for Champion certain periodicals published by Champion which were thereafter designated in writing which writing is appended to such distribution agreement.

7. Further, under the terms of said distribution agreement, advances were made by Curtis to Champion which advances Curtis was entitled to recoup from subsequent payments which might become due to Champion on any

other issues or publications which Curtis was distributing for Champion. Thus, the agreement provided:

> "If, for any reason, Curtis makes an overpayment to Publisher on any one publication or issue it distributes for Publisher, such overpayment may be deducted by Curtis from any subsequent payment due on any publication or issue which Curtis may distribute for Publisher."

The distribution agreement was for a term of five years.

8. After the execution of said written distribution agreement, Curtis acted as distributor for Champion under the terms of such agreement and made advances to Champion and, in the latter part of 1972, by virtue of such advances, Champion was substantially indebted to Curtis.

9. Also, an air freight company which had shipped the magazines published by Champion and being distributed by Curtis, had instituted suit against Champion, Sugar, Curtis (and the printer of such periodicals) for allegedly unpaid freight forwarding charges, which charges under the terms of the distribution agreement were acknowledged by Champion and Sugar to be the liability of Champion and not of Curtis. Despite the terms of the distribution agreement and such acknowledgment, Curtis was naturally concerned by the institution of such lawsuit and Champion's failure to pay such charges.

10. While Curtis and its attorneys were engaged in attempting to resolve these matters, certain startling facts came to the attention of the Curtis attorneys from sources other than Champion or its attorneys, which facts indicated that a fraud had been or was being perpetrated upon Curtis by Champion and Sugar and a corporation

known as Wrestling Revue, Inc. (hereinafter "Wrestling"), one of the plaintiffs in this action.

11. The substance of the facts which came to the attention of Curtis and its attorneys was the following:

(a) That Wrestling (of which it was later revealed Sugar purportedly owned 75% of the capital stock and a family trust of which the wife of one of his attorneys is trustee and their children beneficiaries, purportedly owned the other 25%) had represented to third parties that Wrestling, not Champion, was the owner of the publications which Champion had engaged Curtis to distribute under the terms of said distribution agreement.

(b) That based upon such representations, Wrestling had entered into two separate agreements with such third parties during the latter part of 1972 for the sale of such publications to such third parties with the consideration for such sale payable to Wrestling, not to Champion.

(c) That Wrestling had based such representations of ownership upon further representations that: Champion (of which it was later revealed Sugar purportedly owned 80% of the capital stock) had never owned such publications but was publishing the same under a mere license given by Wrestling to Champion; that such license had issued some time prior to the entry by Champion into its distribution agreement with Curtis; and that such license had been forfeited by Champion in or about November 1972 by virtue of its failure to pay license fees to Wrestling.

(d) One of the third parties to whom some of such publications were purportedly sold by Wrestling is National Sports Publishing Corporation (hereinafter "National"), one of the defendants in this pending action.

(e) The discovery of such facts, from sources other than Sugar or Champion, who had not revealed such facts to Curtis, indicated that Sugar and Champion had engaged in a fraudulent scheme to deprive Curtis of the ability to collect the monies due to it from Champion either (i) by concocting the licensing arrangement with Wrestling prior to the August 1971 distribution agreement and failing to disclose to Curtis that Champion was not in fact the owner of the publication which it had contracted to have Curtis distribute, or (ii) by concocting the purported license agreement after the fact, that is, after the execution of the August 1971 agreement and perhaps some time in late 1972 in order to effectuate the purported sale by Wrestling of the publications to which Champion in fact had valid title.

12. As Sugar, through Wrestling, had purported to sell the publications to third parties under arrangements where the consideration for such sales flowed to Wrestling and not to Champion, Curtis, in order to protect its rights in the proceeds of such sales, had to find a way to stop the flow of such assets into the hands of persons or entities who could dissipate such assets. Curtis had no way of determining who among Sugar, Wrestling and Champion were receiving or had received any of the assets to which Champion alone, as trustee for its creditors, was entitled; under the terms of the contracts of sale, one or more payments had already become due and unless Curtis acted promptly, other payments would become due.

13. Accordingly, Curtis commenced the action in the State Court which is the subject of the complaint in this Court, wherein the order of attachment was issued on April 13, 1973.

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

14. The complaint in the action and the affidavit in support of the application for the order of attachment (Appendix A to Curtis answer herein) set forth in substance the facts hereinabove alleged. As provided in Article 62 of the New York Civil Practice Law and Rules, the application was made ex parte based on Section 6201, subdivisions 4, 5 and 8, all of which are based upon fraudulent acts of defendants. It is respectfully submitted that to have given notice of such application for such order of attachment on the basis of the facts which had come to the attention of Curtis, and which had been secreted from Curtis by Sugar, Champion and their attorneys, would have been foolhardy, in that such facts indicated a clear danger that notice itself might precipitate further flow and dissipation of assets of Champion beyond the reach of its creditors.

15. This affidavit would become unduly lengthy if the facts uncovered by Curtis and its attorneys in depositions taken in the Curtis State action and by virtue of investigations during that action were set forth herein. Moreover, such facts form the basis of Curtis' proof and its contentions in the pending State action and it is not Curtis' purpose to litigate those issues before this Court, especially not on this motion. Suffice it to say that the further facts uncovered by Curtis and its attorneys following the institution of the Curtis State action, in the considered opinion of your deponent, demonstrate the truth of the allegations set forth in the Curtis affidavit in support of its application for an order of attachment.

II. *Facts Concerning Proceedings in State Courts*

16. Much of the salient facts are admitted on the face of the complaint in this action.

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

(a) It is alleged (¶ 20) that the purported agreement between Wrestling and National for the sale of some of the publications which Champion had engaged Curtis to distribute was made on November 28, 1972.

(b) The first installment required by the purported agreement in the amount of $25,000 was paid at that time (¶ 20) and such payment is not placed in issue in this action.

(c) A second payment in the amount of $12,500 purportedly became due on February 28, 1973 (¶ 20) and National failed and refused to make such payment when it became due (¶ 21).

(d) The reason National refused to make such payment when it became due was stated in a letter it addressed to Wrestling and Sugar on February 28, 1973, a copy of which is annexed hereto as Exhibit A. As shown by said letter, National deducted and set off the $12,500 payment on account of the claims of Curtis against Champion and derivatively against National based on the asserted liability of the latter under the terms of the distribution agreement, so that on February 28, 1973, a month and a half *prior* to the commencement of the Curtis State action and the issuance of the order of attachment, National, unknown to Curtis, had resolved to retain the monies with respect to which plaintiffs claim they were deprived of property rights by virtue of the subsequent order of attachment.

(e) It is respectfully submitted that upon National's taking such position, the plaintiffs had no more property rights in the monies than did Curtis; neither of them had any rights to possession of the monies; and the monies could not be acquired by either of them until the tripartite dispute was resolved among the parties, either through private negotiations or through the Courts.

(f) The only rights which the plaintiff had upon National's refusal to make payment was the right to sue National for breach of contract; it is this crucial point that tends to be obscured by plaintiffs' action herein claiming a deprivation of property rights without due process.

17. Indeed, the plaintiffs quite promptly elected to exercise that right by instituting an action against National within a week after National's refusal to pay. On March 5, 1973, Wrestling sued National in the Supreme Court of the State of New York, Westchester County, Index No. 6275/73 (Complaint ¶ 21) alleging a breach of contract arising out of failure to make the refused payment and demanding the $12,500 payment and the entire purchase price thereafter to become due under the purported agreement. The said action is still pending (¶ 21).

18. It was only after National's *private* determination not to pay the monies over to plaintiffs and after the plaintiffs commenced the action against National, and on April 13, 1973, that Curtis commenced its State action against the plaintiffs and Champion, wherein the order of attachment issued and was served on National on April 16, 1973. The effect of such service on National, insofar as any alleged property rights of plaintiffs were concerned, was mere surplusage, as National had refused to make any payments to plaintiff in any event unless and until the plaintiffs reduced their claim to judgment in the pending Westchester action.

19. Since National had, prior to the attachment, withheld payment to secure itself against claims asserted by Curtis, it decided to pay over to the Sheriff so much of the monies as it was withholding, in any event, as were applicable to the Curtis claim (having made other deductions from the original amount withheld to cover claims other

than those of Curtis). Thus National elected to substitute the Sheriff as the depository of the monies it was withholding for the Curtis claim instead of holding such monies itself. The result of this decision affected no one's rights to the proceeds, as those rights became fixed when National resolved to retain the monies until the claims of the parties were resolved. That National's intention was simply to substitute the Sheriff as depository pending such determination of rights is demonstrated (a) by the garnishee statement rendered to the Sheriff (Exhibit B annexed hereto) and (b) National's answer in this action, including its prayer that if the attachment should be dissolved, the monies be returned to National.

20. The effect of National substituting the Sheriff as depository of the funds it had previously resolved to withhold in any event upon the plaintiffs was absolutely nil. Their only right, the right to sue National for breach of contract, remained entirely intact and wholly unaffected; plaintiffs were no more deprived of any property rights by virtue of such transfer to the Sheriff than they were by National's previous retention of the funds in its own hands.

21. What the plaintiffs seek to achieve in this action is to convert their right to sue for breach of contract, of which they have not been deprived—witness their pending action in the State Courts, into a constitutional claim of deprivation of property without due process. But the most careful scrutiny of the facts fails to reveal the *res* of which the plaintiffs have been deprived. Far from being prejudiced by the attachment, if the plaintiffs succeed in having this Court dissolve the attachment and paying over the monies to plaintiffs, they will have realized what they never could have realized without the attachment, viz., possession of

monies to which they had no right of possession in the first instance, by virtue of National's retention of such monies prior to the attachment. Moreover, if the monies are turned over to the plaintiffs, they will have obtained, to the extent of such funds, the very relief they seek in their State Court action for breach of contract, without ever proving *their* entitlement to such funds in the pending State action or in this action.

22. If the foregoing circumstances could have left any room for doubt that plaintiffs had no rights in the proceeds retained, first by National, then by the Sheriff, except the right to litigate their claims as they elected to do, such doubt was clearly eliminated by the plaintiffs themselves. On May 8, 1973, a motion was made by plaintiffs in the Westchester court to consolidate the Curtis State action into the plaintiffs' State action in Westchester County, which motion was granted on September 25, 1973 and the consolidated action is still pending. Plaintiffs' affidavit in support of such motion explicitly pointed out to the Court that:

> ". . . the primary issue of law and fact presented to the Court in the action brought by Wrestling against National relates to its right of offset for the claim asserted by Curtis . . . ."

23. Prior to the consolidation of the State actions, plaintiffs might have argued that the deposit of the monies with the Sheriff did in fact deprive them of property without due process on the theory that if they succeeded in their action against National for breach of contract, National would have an offset to the extent of the proceeds paid over to the Sheriff. If such argument ever had any validity, it was made moot and academic by the election of the plain-

tiffs to consolidate the two actions so that the rights of Curtis against the plaintiffs and Champion and the rights of the plaintiffs against National would be determined simultaneously. Such simultaneous determination of the respective rights of the parties now assures the plaintiffs that any monies with respect to which they prove their entitlement in their breach of contract action will not be withheld from them by virtue of the attacment and the deposit of the subject proceeds by National with the Sheriff.

24. Consequently, the plaintiffs' motion to consolidate the two actions clearly represented an election of remedies to preserve their rights for claimed breach of contract by such consolidation rather than by a constitutional or more pedestrian attack upon the order of attachment itself. Indeed, the consolidation of said actions does in fact serve as an eminently just and fair solution to any problems which plaintiffs might otherwise have had by virtue of the attachment and the deposit of monies with the Sheriff. In short, the consolidation assures the plaintiffs that if they prevail on their claim of breach of contract against National, they will have suffered no loss or harm by virtue of the attachment. This is no more or less than the entitlement which the plaintiffs had prior to the attachment and the deposit of monies with the Sheriff.

25. Assuming arguendo that the plaintiffs have not waived their right to contest the attachment, it is respectfully submitted that the prior proceedings in the two State Court actions referred to and the present pending consolidated action, require that the plaintiffs should be challenging the order of attachment in the actions pending in the State Courts. It is also to be noted that the Curtis State action was pending some ten months before this

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

Federal action was commenced. During all of that time the plaintiffs never sought relief in the State Court to vacate the attachment either on constitutional grounds or on any other grounds. During that time, the plaintiffs have not only moved to consolidate the two State actions but have also participated in pretrial depositions, instituted both by themselves and by Curtis.

26. Accordingly, on this record, the Federal Courts should decline jurisdiction over a matter for which relief can be obtained in the State Courts on general grounds of federalism, comity and equity. The issues among all of the interested parties have been drawn in the State Court actions; pretrial discovery has been pursued in the State Court actions and the relief which the plaintiffs seek in this action is available in the State Court actions. It is respectfully submitted that this is clearly a case where the Federal Court should decline to interfere with the State Court proceedings by taking jurisdiction itself.

27. On the basis of the foregoing, it is respectfully requested that the complaint be dismissed.

28. It is also respectfully requested that if the Court should not dismiss the complaint on any of the grounds set forth herein, that it alternatively stay further proceedings in this action pending the rendition of a decision by the United States Supreme Court in an action known as *Mitchell* v. *W. T. Grant Co.*, No. 72-6160, now *sub judice*. The case is commented upon in 42 LW 3345, 1086. It was argued in early December 1973 and the Court's decision in that case might clearly be dispositive of the constitutional issues presented here, whereas *Fuentes* v. *Shevin*, 407 U.S. 67 relied upon by plaintiffs is not.

Affidavit of Fred I. Sonnenfeld, in Support of Motion to Dismiss.

First, *Fuentes* (involving the constitutionality of two State replevin statutes) was not decided by the full bench but by a 4-3 split decision in which neither Justices Powell nor Rehnquist partook. *Mitchell* (involving the constitutionality of the Louisiana sequestration statute) was argued before the full bench and its decision may very well depart from the *Fuentes* approach. 42 LW 1086.

Second, upon the argument of *Mitchell*, several justices are reported to have indicated that they were considering overruling the decision of the Court in *Fuentes*. 42 LW 1086.

Third, two distinctions between the replevin statutes under consideration in *Fuentes* and Article 62 of the New York Civil Practice Law and Rules may be passed upon in *Mitchell:*

(a) *Fuentes* did not decide whether ex parte seizure orders would be constitutional upon a showing that they were required to preserve the assets; that question is raised in *Mitchell*, 42 LW 1086.

(b) *Fuentes* did not decide whether ex parte signed orders which were subject to judicial review (as opposed to their ministerial issuance by a non-judicial official) would be constitutional; that question is also raised in *Mitchell*, 42 LW 1086.

29. By reason of the foregoing, it is respectfully requested that the complaint be dismissed or, alternatively, that this action be stayed pending decision of the Mitchell case.

(Sworn to by Fred I. Sonnenfeld, February 11, 1974.)

Exhibit A, Letter, February 28, 1973.

NATIONAL STORES PUBLISHING CORPORATION
Room 1400
150 East 58th Street
New York, N. Y. 10022

February 28, 1973

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Wrestling Revne, Inc. and
Mr. Bert Randolph Sugar
c/o John G. Ledes, Esq.
Maple Avenue
Katonah, New York 10536

Gentlemen:

We refer to the agreement dated November 28, 1972 whereby we purchased from Wrestling Revue, Inc. certain interests in THE BASKETBALL NEWS, GRIDIRON, GRIDIRON PRO YEARBOOK, GRIDIRON COLLEGE YEARBOOK and other publications, and to the Guaranty and Agreement of Mr. Bert Randolph Sugar of the same date in connection with such agreement and purchase.

Please be advised that Curtis Circulation Company, The Chestnut East Building, 811 Chestnut Street, Philadelphia, Pennsylvania 19105, has asserted the claim that we are subject to the terms of the distribution agreement made in 1971 with respect to the above named magazines, and that the sum of $19,974.90 is presently due Curtis Circulation Company by GRIDIRON and the sum of $13,377.23 by BASKETBALL NEWS.

Curtis Circulation Company has further called our attention to a contingent liability in the amount of $42,095.87

resulting from a claim and cross-claim in the action entitled *Emery Air Freight Corporation* v. *Sugar, et al.*

Pursuant to the provisions of Paragraph 8 of the aforementioned purchase agreement and the Guaranty and Agreement, we hereby demand that each of you indemnify and hold us harmless against such claims by Curtis Circulation Company and related expenses.

Without limiting our right to such indemnities or our further rights in the premises, we hereby deduct and set off the amount of such claims, to the extent of $12,500, from the installment of the purchase price due under Paragraph 2(b) of the purchase agreement. Therefore, no amount is presently due and payable to Wrestling Revue, Inc. and no payment is enclosed.

Very truly yours,

NATIONAL SPORTS PUBLISHING
CORPORATION
By HARRY P. DEDYO

cc: Levy and Ledes, Esqs.

Exhibit B, Garnishee Statement.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

CURTIS CIRCULATION COMPANY,

Plaintiff,

against

CHAMPION SPORTS PUBLICATIONS, INC., WRESTLING REVUE, INC. and BERT RANDOLPH SUGAR,

Defendants.

Index No. 6102/73

TO THE SHERIFF OF THE CITY OF NEW YORK:

In compliance with Section 6219 of the Civil Practice Law and Rules, and with reference to the order of attachment against the property of Champion Sports Publications, Inc., Wrestling Revue, Inc. ("Wrestling") and Bert Randolph Sugar ("Sugar"), defendants in the above entitled action, served on National Sports Publishing Corporation ("National") on the 16th day of April, 1973, I, HARRY P. DEDYO, Vice President of National, do hereby state that:

1. National as Buyer and Wrestling as Seller entered into an agreement dated November 28, 1972 as of October 31, 1972 (the "Purchase Agreement"), whereby National purchased certain assets including the names, trademarks and goodwill of certain magazines. The Purchase Agreement provides for the payment by National to Wrestling of $12,500 on account of the purchase price on February 28, 1973, subject however to the terms and conditions of

Exhibit B, Garnishee Statement.

the Purchase Agreement, including without limitation National's right to set off and deduct the amount of certain claims and expenses. Pursuant to the Purchase Agreement, National set off and deducted, prior to the date of service of the order of attachment herein, a total of $3,176.46, leaving $9,323.54 as the balance of such February 28, 1973 installment. Prior to the date of service of the order of attachment herein, National set off and deducted such balance against claims of Curtis Circulation Company, the plaintiff herein, which I am informed and believe are among the claims which are the subject matter of this action. Accordingly, National is making payment to the Sheriff of the City of New York in the amount of $9,323.54, in discharge, to the extent of such payment, of its obligation of Wrestling with respect to the February 28, 1973 purchase price installment and of the claims of Curtis Circulation Company described above.

2. The Purchase Agreement provides for an additional payment by National to Wrestling of $12,500 on account of the purchase price on May 28, 1973, again subject to the terms and conditions of said Agreement.

3. The Purchase Agreement further provides for contingent payments, as part of the purchase price, up to a maximum of $50,000. Such payments will be due only if there are certain after-tax profits of National from the magazines acquired by it from Wrestling and are again subject to the terms and conditions of the Purchase Agreement. The first of such additional payments will not be due in any event until March 31, 1974.

4. Pursuant to an employment agreement dated November 28, 1972 between National and Sugar, National agreed to pay Sugar a salary at the rate of $12,500 per year, in equal monthly installments, subject to the terms and condi-

Exhibit B, Garnishee Statement.

tions of such agreement. Such salary has been paid to May 15, 1973. Said employment agreement further provides for certain contingent payments based on advertising sales, none of which payments are due; for certain contingent payments based on the after-tax profits, if any, of two of the magazines included in the sale from Wrestling, the first of which payments will not be due in any event until March 31, 1974; and for certain editorial fees, none of which are now due.

5. Pursuant to a separate agreement dated November 28, 1972, National subleased certain premises from Wrestling on the terms and conditions set forth therein, at a rental currently amounting to $200.00 per month. Such rent has been paid to April 28, 1973. Said agreement further provides for payment by National of certain typesetting charges, none of which are now due.

6. Pursuant to the Purchase Agreement and a separate escrow agreement between the parties dated November 28, 1972, a balance of $271.01 is being held in escrow by National's attorneys, Gilbert, Segall and Young, with respect to certain expenses claimed to have been incurred by Wrestling. No part of such balance will be due to Wrestling unless and until verification has been completed, and if such expenses cannot be properly verified, such balance will belong to National.

NATIONAL SPORTS PUBLISHING CORPORATION

By HARRY P. DEDYO

Vice President

April 26, 1973.

Supplemental Affirmation in Support of Motion for Dismissal Pursuant to Rule 12(b).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK }

PHILIP H. BUSNER, an attorney at law duly admitted to practice before the Courts of the State of New York, and before this Court, and a member of the firm of Young, Sonnenfeld & Busner, attorneys of record for the defendant Curtis Circulation Company herein, hereby alleges under penalties of perjury:

1. This affirmation is made to supplement the affidavit of Fred I. Sonnenfeld, sworn to February 11, 1974, in support of a motion by the defendant Curtis heretofore served and filed with this Court, which motion is returnable March 6, 1974.

2. The motion herein is for dismissal of the complaint pursuant to Rule 12(b) on grounds including (a) the pendency of a prior action in the New York Supreme Court, Westchester County, which is presently pending and in which the plaintiffs seek the identical relief which is sought in this action and (b) the constitutional issue raised in this action can be raised by the plaintiffs in a consolidated action now pending in the Courts of the State of New York and upon the prior proceedings in said State actions and the circumstances of this case, this Court should decline jurisdiction over the within action.

Supplemental Affirmation in Support of Motion for Dismissal Pursuant to Rule 12(b).

3. On the same day that the Curtis motion papers on this application were served, February 12, 1974, the plaintiffs in this action served a notice of cross-motion upon the defendants Curtis and National in the presently pending consolidated actions in the New York Supreme Court, Westchester County to which reference was made in the original Curtis motion papers. Annexed hereto as Exhibit 1 is a copy of said notice of cross-motion and the affirmation submitted in support thereof. It is respectfully submitted that such papers have a direct bearing upon the issues presented by the within motion and, particularly, are demonstrative of the Curtis position on this motion, to wit, that upon the circumstances of this case, this Court should decline to take jurisdiction, on grounds that a previous action is pending and on grounds of comity, federalism and equity.

4. As shown by Exhibit 1, the plaintiffs in this action have requested a stay of further proceedings by Curtis in the pending State consolidated action on the ground that the attachment issued therein effected a deprivation of their property without due process of law.

5. Hence, the plaintiffs in this action having scrupulously avoided presenting the constitutional issue in the State Courts during some ten months of litigation and having now brought that issue before this Court, now seek relief in the State Court actions on the very same issue. Clearly, this latest action of said plaintiffs is demonstrative of the endless exacerbation of issues and multiplicity of litigations, and possibility of the rendition of conflicting decisions by the State Court and this Court which will ensue if this Court accepts jurisdiction of the action presented in the complaint.

Supplemental Affirmation in Support of Motion for Dismissal Pursuant to Rule 12(b).

6. Annexed hereto as Exhibit 2 is a copy of the affirmation submitted on behalf of Curtis in said State Court action, wherein the quandary of Curtis is set forth with respect to how to respond to plaintiffs' tactics of dividing the controversy among the parties into bits and pieces presenting such parts as the plaintiffs from time to time elect in one forum or another.

7. On the basis of the original motion papers filed by Curtis herein and this affirmation and the exhibits annexed hereto, it is respectfully requested that the relief sought by Curtis herein be granted.

Dated: New York, New York
February 19, 1974

PHILIP H. BUSNER
Philip H. Busner

Notice of Appearance (Attorney General).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that the defendants Malcolm Wilson, Louis J. Lefkowitz, Attorney General, Justices Sidney A. Fine and George Beisheim hereby appear in the above entitled action, and that the undersigned has been retained as attorney for said defendants and demands that all papers in this action be served upon the undersigned at the office and post office address stated below.

Dated: New York, New York
January 31, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se and Attorney for
Defendants Fine & Beisheim

To: LEVY & LEEDS
Attorneys for Plaintiffs

Notice of Motion to Dismiss Complaint (Attorney General).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of A. Seth Greenwald, sworn to July 2, 1974, the memorandum of law (to be filed by July 8, 1974 pursuant to order of the Court), the undersigned will move this statutory Court, on July 10, 1974, at 4:00 o'clock in the afternoon, Courtroom 2703, United States Court House, Foley Square, New York, New York, for an order pursuant to the Federal Rules of Civil Procedure, Rules 12(b)(1) and (6), dismissing the complaint and amended complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief may be granted and for such other and further relief as may be just and proper.

Dated: New York, New York
July 2, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se and Attorney for
defendants Wilson, Fine
and Beisheim

By: A. SETH GREENWALD
A. SETH GREENWALD
Assistant Attorney General

To: LEVY & LEDES, Esqs.
YOUNG, SONNENFELD & BUSNER, Esqs.
GILBERT, SEGALL & YOUNG, Esqs.

Affidavit of A. Seth Greenwald.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, *pro se* and attorney for defendants Wilson, Fine and Beisheim. For the reasons stated in the memorandum of law to be filed by July 8, 1974 (see order of June 20, 1974, LASKER, D.J.). I, respectfully request that the defendants' motion to dismiss be granted. While the three-judge court has been convened, I subject that the complaint is insufficient as a matter of law. *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 40 L. Ed. 2d 406 (1974).

I would also like to point out that Malcolm Wilson, Governor of the State of New York, is not properly a defendant in this action since he has no special responsibility for the enforcement of the statute herein involved, over and above his general duties as Chief Executive of the State. New York Constitution, Article IV, § 1. *Fitts* v. *McGhee*, 172 U.S. 516, 19 S. Ct. 269 (1899); *Oliver* v. *Board of Education*, 306 F. Supp. 1286 (S.D.N.Y. 1969); *Camacho* v. *Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961); *Coon* v. *Tingle*, 277 F. Supp. 304 (N.D. Ga. 1967). Likewise Louis J. Lefkowitz, the Attorney General of the State of New York, had no statutory duties as to attach-

Affidavit of A. Seth Greenwald.

ments, CPLR Art. 62. Of course the Attorney General can and must defend the state statute's constitutionality, N.Y. Executive Law § 71, regardless of his status as a named defendant.

Apparently, plaintiffs seek damages. Defendants Fine and Beisheim, as Justices of the Supreme Court of the State of New York, are immune for liability for damage for their judicial acts. *Pierson* v. *Ray*, 386 U.S. 547, 553-555 (1967).

WHEREFORE, your deponent respectfully requests that the complaint be dismissed.

(Sworn to by A. Seth Greenwald, July 2, 1974.)

Supplemental Complaint.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, by their attorneys Gabriel I. Levy and John G. Ledes, for their supplemental complaint against the defendants other than National Sports Publishing Corporation, respectfully alleges to the Court and shows that since the time when plaintiff's complaint was filed, the following additional facts have occurred which further deprived plaintiff, Wrestling Revue, Inc. of its property, without notice and hearing in violations of the procedural due process rights guaranteed to Wrestling Revue, Inc. by the Fourteenth Amendment to the Constitution of the United States.

1. On the 8th day of March, 1974 Wrestling Revue, Inc. ("Wrestling Revue") and National Sports Publishing Corporation ("National Sports") entered into an agreement settling all disputes between them, which inter alia provided for the payment of $15,676.46 by National Sports to Wrestling Revue in stated installments on April 30, 1974, May 31, 1974 and June 30, 1974 and further provided that if on the due date of any payment provided for therein, such payment is subject to the levy under the Attachment Order or any renewal or extension thereof, National Sports shall make such payment to the Sheriff of the City of New York, instead of Wrestling Revue.

2. On April 16, 1974, Curtis Circulation Company secured an order from the Supreme Court of the State of New York, County of Westchester, pursuant to Article 62

of the Civil Practice Law and Rules of the State of New York, extending the levy under the Order of Attachment for an additional year, until March 24, 1975 with respect to "[a]ll property in the possession or control of National Sports Publishing Corporation in which any or all of the defendants Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, have any title or interest, thereby under color of state law further violating the procedural due process rights guaranteed to Sugar, Wrestling Revue and Champion Sports by the Fourteenth Amendment to the Constitution of the United States, by providing for the continued taking of their property by the State of New York without prior notice and an opportunity to be heard.

3. On April 30, 1974, National Sports made a further payment pursuant to the Order of Attachment and Levy to the Sheriff of $4,865, which monies were the property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

4. On June 5, 1974, National Sports made a further payment pursuant to the Order of Attachment and Levy to the Sheriff of $5,000, which monies were the property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

5. On June 30, 1974, National Sports will be required to make the final payment under the aforesaid settlement agreement of March 8, 1974 in the amount of $4,811.46 and pursuant to the Order of Attachment and Levy will be required to make such payment to the Sheriff, and of which, monies, Wrestling Revue will be immediately entitled to the beneficial use thereof on the 30th day of June, 1974.

Supplemental Complaint.

6. The payments made by National Sports to the Sheriff as set forth in ¶¶ 3 and 4, ante, and the payment that National Sports will be required to make to the Sheriff on June 30, 1974, as set forth in ¶ 5, ante, violate the procedural due process rights of Wrestling Revue guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, by the Sheriff on behalf of the State of New York, taking its property from National Sports, without prior notice and an opportunity to be heard.

SUPPLEMENTAL PRAYER FOR RELIEF

That in addition to the prayer for relief contained in Part XI of the original complaint in this proceeding, that the 3-judge court convened herein direct and order the Sheriff of the City of New York to forthwith pay over and to deliver to Wrestling Revue the sum of $24,200 and to Bert Randolph Sugar the sum of $124.17 presently in his custody and possession, received by him pursuant to the Order of Attachment and levies made thereunder, with lawful interest thereon, without any deductions for any fees, costs and expenses.

Dated: New York, New York
June 24, 1974

GABRIEL I. LEVY
GABRIEL I. LEVY
JOHN G. LEDES
JOHN G. LEDES
Of the Firm of LEVY AND LEDES
Attorney for Plaintiffs

Order Pursuant to CPLR 6214(b).

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Westchester County Courthouse, in the City of White Plains, on the 7th day of December, 1973.

Present: HON. GEORGE BEISHEIM, JR., Justice

Index No. 6275/73

ACTION NO. 1

WRESTLING REVUE, INC.,
Plaintiff,

—against—

NATIONAL SPORTS PUBLISHING CORPORATION,
Defendant.

ACTION NO. 2

CURTIS CIRCULATION COMPANY,
Plaintiff,

—against—

CHAMPION SPORTS PUBLICATIONS, INC., WRESTLING REVUE, INC. and BERT RANDOLPH SUGAR,
Defendants.

Upon the annexed affirmation of PHILIP H. BUSNER dated December 4, 1973, CURTIS CIRCULATION COMPANY (plaintiff

Exhibit A, Ordr Pursuant to CPLR 6214(b).

in Action No. 2) having duly moved for an order pursuant to CPLR 6214(b) to extend the time for payment, transfer or delivery of property hereinafter described and in the possession or custody of the person hereinafter described, and in which Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar (defendants in Action No. 2) have an interest, to the Sheriff of the County of New York, pursuant to levy made by the said sheriff by service of an order of attachment made by Sidney A. Fine, Justice of the Supreme Court, County of New York, on April 13, 1973, upon National Sports Publishing Corporation, until March 24, 1974, upon the ground that the ninety day period after the service of such attachment upon said garnishee, on which they are to make payment, transfer or delivery is about to expire,

Now, on motion of YOUNG, SONNENFELD & BUSNER, attorneys for Curtis Circulation Company, it is

ORDERED that the motion be and the same hereby is granted and that the time in which to pay, transfer or deliver the following described personal property be and hereby is extended to March 24, 1974:

> All property in the possession or control of National Sports Publishing Corporation in which any or all of the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar have any title or interest.

ENTER

GEORGE BEISHEIM, JR.
J.S.C.

Exhibit

Affirmation in Support of Order Pursuant to CPLR 6214(b).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ACTION No. 1

WRESTLING REVUE, INC.,
Plaintiff,

against

NATIONAL SPORTS PUBLISHING CORPORATION,
Defendant.

ACTION No. 2

CURTIS CIRCULATION COMPANY,
Plaintiff,

against

CHAMPION SPORTS PUBLICATIONS, INC., WRESTLING REVUE, INC. and BERT RANDOLPH SUGAR,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK }

PHILIP H. BUSNER, an attorney at law duly admitted to practice before the Courts of the State of New York and a partner in the firm of YOUNG, SONNENFELD & BUSNER, attorneys of record for Curtis Circulation Company, affirms

Exhibit.

under penalties of perjury as follows:

1. I am fully familiar with all the facts hereinafter stated.

2. The within action represents a consolidation of two actions, the first action listed having been commenced in Westchester County and the second action listed having been commenced in New York County. The actions were consolidated by order of this Court dated September 25, 1973.

3. On April 13, 1973, an order of attachment was made and entered in the New York County action directing the Sheriff of New York County to levy upon the property of Champion Sports Publications, Inc., Wrestling Revue, Inc. and BERT RANDOLPH SUGAR. A copy of said order is annexed hereto as Exhibit A.

4. Thereafter, the Sheriff of New York County levied by service of the order of attachment on National Sports Publishing Corporation on April 16, 1973 and then again levied by service on the same corporation on September 24, 1973. Pursuant to the earlier levy, the sheriff took into possession the sum of $9,323.54. In response to both levies, National Sports Publishing Corporation notified the sheriff in their respective garnishee statements that there were additional monies that would have been owing by National Sports Publishing Corporation pursuant to various agreements except for the claim of National Sports Publishing Corporation that it had offsets against said defendants which were in excess of such monies otherwise due and owing. Accordingly, the sheriff has not taken any additional monies into possession although the order of attachment is in the amount of $28,588.08 exclusive of probable interest, costs, sheriff's fees, etc.

Exhibit.

5. The latter levy made by the sheriff was made by service of the order of attachment on September 24, 1973. Pursuant to CPLR 6214(b), the time for payment, transfer or delivery of the funds held by National Sports Publishing Corporation will expire on December 24, 1973. Curtis Circulation Company requires additonal time to investigate and determine the bona fides of the claim of National Sports Publishing Corporation that it has a right to withhold such additonal funds from the levy of the sheriff.

WHEREFORE, it is respectfully requested that an order issue extending the time to pay, transfer or deliver for six months until March 24, 1974.

Dated: New York, New York
December 4, 1973.

PHILIP H. BUSNER

Order.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Westchester at the Westchester County Courthouse, in the City of White Plains on the 16th day of April, 1974.

Present

HON. ANTHONY J. CERRATO,
Justice.

Index No. 6275/73

Action No. 1

WRESTLING REVUE, INC.,

Plaintiff,

against

NATIONAL SPORTS PUBLISHERS CORPORATION,

Defendant.

Index No. 6102/73

Action No. 2

CURTIS CIRCULATING COMPANY,

Plaintiff,

against

CHAMPION SPORTS PUBLICATIONS, INC. WRESTLING REVUE, INC., and BERT RANDOLPH SUGAR,

Defendants.

The plaintiff in Action No. 2 having moved this Court for an order pursuant to CPLR 6214 (b) and (e) extending the time for payment, transfer or delivery or property in the hands of National Sports Publishers Corporation,

levied upon by the Sheriff of the County of New York pursuant to an order of attachment made in said Action No. 2 and extending the time within which to file a special proceeding to compel payment, delivery or transfer of such property to March 24, 1975, and said motion having come on to be heard and the Court having rendered its decision in writing,

Now, on reading and filing the order to show cause dated March 11, 1974, the affirmation of Philip H. Busner, dated March 7, 1974, and the exhibits annexed thereto, in support of said motion, and no papers having been submitted in opposition to said motion and upon all of the pleadings and prior proceedings herein,

Now, on motion of Young, Sonnenfeld & Busner, attorneys for Curtis Circulating Company, plaintiff in Action No. 2, it is

ORDERED, that said motion is granted in all respects, and it is further

ORDERED, that the time in which to pay, transfer or deliver the following described personal property, and the time within which to file a special proceeding to compel payment, delivery or transfer of such property, be and hereby is extended to March 24, 1975:

> All property in the possession or control of National Sports Publishing Corporation in which any or all of the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc., and Bert Randolph Sugar, have any title or interest.

Enter

s/ HON. ANTHONY J. CERRATO, Justice
J. S. C.

Opinion, 3 Judge Court, Reproduced at Jurisdictional Statement p. 1a.

Opinion and Order Conveying 3 Judge Court, Reproduced at Jurisdictional Statement p. 15a.

Judgment, 3 Judge Court, Reproduced at Jurisdictional Statement p. 31a.

Notice of Appeal, New York State, Reproduced at Jurisdictional Statement p. 35a.

Notice of Appeal, Curtis Circulation Co. and Continental Casualty Co., Reproduced at Jurisdictional Statement p. 33a.

Letter of Messrs. Levy and Ledes to the Honorable John J. McCloskey, Sheriff of the City of New York, dated December 21, 1973 (p. 168 of Plaintiffs' Appendix).

Law Offices
LEVY AND LEDES
270 Madison Avenue, New York, N. Y. 10016
(212) 371-8000

December 21, 1973

JOHN C. LEDES
GABRIEL I. LEVY

The Honorable John J. McCloskey
Sheriff of the City of New York
New York County Division
31 Chambers Street
New York, New York 10007

Re: Curtis Circulation Company v.
Champion Sports Publishing Inc.
Wrestling Revue, Inc. and Bert
Randolph Sugar

Dear Sir:

We are the attorneys for Champion Sports Publishing, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar in connection with an action commenced by Curtis Circulation Company as plaintiff in the Supreme Court, New York County, Index No. 6102/73.

We have been advised by National Sports Publishing Corporation that on April 13, 1973, an Order of Attachment was granted to the plaintiff in such action against the property of all of the defendants to the extent of $28,588.08 and that you have levied against funds due to Wrestling

Letter of Messrs. Levy and Ledes to the Honorable John J. McClosky, Sheriff of the City of New York, dated December 21, 1973 (p. 168 of Plaintiffs' Appedix).

Revue, Inc. and Bert Randolph Sugar by National Sports Publishing Corporation.

Demand is herewith made that forthwith you advise in writing as to the amounts of monies presently being held by you pursuant to such Order of Attachment setting forth the dates that such monies were paid over to you by National Sports Publishing Corporation and as to the name of the defendant to whom such monies were due from National Sports Publishing Corporation.

We further demand that you also advise us as to the amounts of any outstanding levies made by you pursuant to such Order of Attachment.

Finally, please advise us if any restraining notices, liens, garnishees or any other claims have been made against the funds being held by you pursuant to such Order of Attachment, setting forth the names, addresses and amounts of such claims.

Your immediate written response hereto is expected.

Very truly yours,

GABRIEL I. LEVY
GABRIEL I. LEVY

GIL/rs

Letter of Messrs. Levy and Ledes to the Honorable John J. McCloskey, Sheriff of the City of New York, dated June 20, 1974 (p. 170 of Plaintiffs' Appendix).

Law Offices
LEVY AND LEDES
270 Madison Avenue, New York, N. Y. 10016
(212) 725-0150

June 20, 1974

JOHN C. LEDES
GABRIEL I. LEVY

The Honorable John J. McCloskey
Sheriff of the City of New York
New York County Division
31 Chambers Street
New York, New York 10007

Re: Curtis Circulation Company v.
Champion Sports Publishing Inc.
Wrestling Revue, Inc. and Bert
Randolph Sugar

Dear Sir:

On December 21, 1973, we wrote to you with respect to monies being held by you subject to an order of attachment in the above-entitled action, being the sole and exclusive property of *our* clients Bert Randolph Sugar and Wrestling Revue, Inc., defendants therein.

At that time we requested that you advise us in writing as to the amounts of money then being held by you pursuant to the order of attachment. You never even had the courtesy to respond to such letter even though the money that you were holding belongs to *our* clients. Since such date we have been advised by National Sports Publishing

Letter of Messrs. Levy and Ledes to the Honorable John J. McClosky, Sheriff of the City of New York, dated June 20, 1974 (170 of Plaintiffs' Appendix).

Corporation that additional monies have been paid under the order of attachment and that you are holding somewhere in the neighborhood of $20,000.

Final demand is herewith made that you immediately advise us in writing as to the amounts of monies presently being held by you pursuant to such order of attachment setting forth the dates that such monies were paid over to you by National Sports Publishing Corporation. We further demand that you advise us if any restraining notices, liens, garnishees or any other claims have been made against the funds being held by you pursuant to such order of attachment setting forth the names, addresses of the claimants and the amounts of such claims, if any.

We might further point out to you that an action had been commenced in January, 1974 in the United States District Court for the Southern District of New York, with respect to such attachment, in which action you were a named party defendant and served with the summons and complaint. Unfortunately you saw fit to completely ignore this proceeding and are in default in both appearing and answering, although you may well be liable for substantial money damages therein if the 3-judge panel being convened therein should declare Article 62 of the New York Civil Practice Law and Rules unconstitutional.

Unless we receive a written response setting forth the demanded information within one week we will request of the 3-judge panel proper relief against the Sheriff of the City of New York.

Your immediate written response is requested.

Very truly yours,

GABRIEL I. LEVY
GABRIEL I. LEVY

GIL/rs

Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1050-51

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

The appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move this Court to dismiss this appeal or, in the alternative, to

affirm the judgment of the statutory three-judge court, sitting in the United States District Court for the Southern District of New York, on the ground that it is manifest that questions on which the decision of the cause depends, have been foreclosed by prior decisions of this Court, and are so unsubstantial as not to need further argument.

Statute Involved

This appeal involves the constitutional validity of certain provisions of the New York Attachment Statute which is contained in Article 62 of the Civil Practice Law and Rules of the State of New York, the complete text of which is set forth in Appendix F of the Jurisdictional Statement of the Attorney General of the State of New York (37a to 49a).[1] The specific sections involved are §§ 6201 (4), (5) and (8); 6211 and 6223.[2]

Statement

A. The Statutory Scheme

The substantive question on this appeal involves the constitutional validity of the New York statutory scheme which permits the pre-judgment seizure of property and debts without notice and hearing and without granting to

[1] Appendix references made herein refer to the Appendix to the Jurisdictional Statement of the Attorney General.

[2] The pertinent provisions of §§6201 and 6211 are found at footnote 1 of the three-judge court opinion (13a; 383 F. Supp. at 644) and §6223 in the body thereof (8a; 383 F. Supp. at 648).

the defendant a meaningful opportunity to vacate an attachment granted ex parte and without prior notice.

§ 6201 inter alia provides that "[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants" in eight different type situations. Subparagraphs 1, 2, 3 and 7 relate to securing jurisdiction over the defendant and subparagraph 6 relates to the wrongful possession of governmental property, and not having been considered by the three-judge court, are not involved in this appeal. The other three sub-paragraphs 4, 5 and 8 relate to various types of alleged fraud on the part of the defendant and are part of the specific subject matter of this appeal.

§ 6211 which is also the specific subject matter of this appeal, sets forth the required contents of the order of attachment and, provides inter alia "[a]n order of attachment may be granted *without notice* before or after service of summons and at any time prior to judgment" (Emphasis supplied).

§ 6212 (b) requires that the plaintiff "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment, whereas pursuant to § 6222 the defendant in order to discharge the attachment and release its property must "give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in

numerous holdings of the New York courts. Without exception they have ruled—for at least fifty years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based 'clearly indicate that the plaintiffs must ultimately fail.' • • •. The burden is on the defendant to establish that the plaintiff *cannot* succeed, • • •; and to demonstrate that the plaintiff has not established a cause of action, which permits attachment, • • •; and to establish that the attachment is unnecessary for the security of the plaintiff, [citing New York cases].

"Indeed under the decisions of New York courts, the merits of the action are irrelvant on a motion to vacate the attachment under § 6223—a construction which we believe is proper in the light of the strictly limited wording of the law." [citing New York cases].

While the District Court found these considerations to be dispositive, it found "other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone since

> "In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion (10a; 383 F. Supp. at 649-650 [and], [t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex-parte determination where, as here, the critical allegations of fraud, however detailed, are based on information and belief" (11a; 383 F. Supp. at 649-50).

ARGUMENT

This appeal presents no substantial question not previously decided by this Court. This Court's most recent decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* and its predecessors are controlling.

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, —— U.S. ——, 43 LW 4192 decided by this Court on January 22, 1975 should be dispositive of this case. There, this Court considered and held unconstitutional a not dissimilar Georgia garnishment statute which made "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment" 42 LW at 4194. In this decision you reaffirmed your decision in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) that "'[a]ny significant taking of property by the State is within the purview of the Due Process Clause.' 407 U.S. at 86 [and that] [b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment" 43 LW at 4193.

For the same reasons as in *Fuentes* this Court held the Georgia statute unconstitutional holding 43 LW at 4194:

> "Here, a bank account, surely a form of property, was impounded and absent, a bond put totally be-

yond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."[4]

In so holding that the Georgia statute was unconstitutional in violation of the Due Process Clause this Court held 42 LW at 4194 that it was not saved by the more recent decision in *Mitchell* v. *W. T. Grant Company,* 416 U. S. 600 (1974) upholding a Louisana sequestration Statute since among other things "[t]he Louisiana law also expressly entitled the debtor to an immediate hearing after seizure, and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued" and that under the Georgia statute precisely as in the New York statute *sub judice,* a sizable amount of money was frozen,

"and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the

[4] The fact that under New York CPLR §6211 a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid for failure to provide an immediate and adequate post-attachment hearing requiring the creditor to prove the grounds upon which the attachment was granted or at least to establish probable cause therefor. The "clerk-judge distinction" is of little significance (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 43 LW at 4198, dissenting opinion of Mr. Justice Blackman).

creditor would be required to demonstrate at least probable cause for the garnishment."[5]

Mr. Justice Powell in his concurring opinion found "[t]he most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate post garnishment hearing" and in making "no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, nor any indication that the garnishor bears the burden of proving entitlement to the garnishment" 43 LW at 4196.

Likewise the challenged provisions of the New York Attachment Statute are unconstitutional in violation of the Due Process Clause since it makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual

[5] In fact the Georgia statute actually affords the alleged debtor greater protection in certain respects than the New York statute since similar to the Louisiana statute upheld in *Mitchell* and the Florida and Pennsylvania statutes declared unconstitutional in *Fuentes,* the Georgia statute "requires plaintiff to file a bond in a sum double the amount sworn to be due" Ga. Code Ann. §46-102, 43 LW at 4193, whereas the New York statute CPLR §6212 (b) only requires the plaintiff to "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (see footnote 3, *ante* at p. 4). Of course "as a matter of constitutional principle, [a bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind" (*Fuentes* v. *Shevin,* 407 U.S. at 83-84).

trial on the merits, which may be several years hence[6] and during such long delay, the seizure continues without abatement. "Due process requires that the State afford an opportunity for a prompt post-garnishment judicial hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 43 LW at 4195, concurring opinion of Mr. Justice Powell).

The District Court applied *Mitchell* to the challenged provisions of the New York Statute (CPLR §§ 6201(4), (5) and (8) and § 6211) in the same manner as this Court most recently did to the Georgia Statute in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* to determine whether it could "squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*" (6a; 383 F. Supp. at 647). As this Court found "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana Statute" (43 LW at 4194), so the District Court found that "the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and] the opportunity for such a hearing was critical to the holding in *Mitchell*, and its absence renders

[6] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two years ago, the case has just recently been placed on the trial calendar by Curtis, which is almost another two years behind. Thus it will be almost three years from the time of the attachment until appellees receive their hearing on the merits which will enable them for the first time to seek to dissolve the attachment by putting Curtis to its proof, and during such entire period of time appellees have been deprived of their money amounting to $24,324.17.

New York's Statute fatally defective" (7a-8a; 383 F. Supp. at 648). Any doubt on this point was laid to rest by this Court in *North Georgia Finshing, Inc.* v. *Di-Chem, Inc.*, which is dispositive of this appeal, and the questions which the appellants' seek to present to this Court have thereby been foreclosed.

CONCLUSION

The challenged provisions of the New York Attachment Statute as found by the District Court are unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice. The questions on which decision of this cause depends have been foreclosed by prior decisions of this Court, and are so unsubstantial as not to need further argument. The judgment of the District Court should be affirmed or the appeal dismissed.

Dated: New York, New York
February 6, 1975

Respectfully submitted,

JOHN G. LEDES,
Attorney for Appellees

Supreme Court, U. S.
FILED
FEB 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

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ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARGUMENT

The Jurisdictional Statements filed herein present a number of substantial issues requiring full briefs and oral argument. Appellees fail to address themselves to any of those issues. Instead, they rely upon some broad assertions which do not stand up under analysis.

First, appellees assert that *North Georgia Finishing Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 43 L.W. 4192, "should

be dispositive of this case". The Georgia statute is hardly analogous to the New York statute. It is plain that under the Georgia statute, the plaintiff completely controls the procedure for obtaining and maintaining a seizure of defendant's property through the rendition of judgment on the merits of the action. The procedure, from inception through judgment, is entirely lacking in statutory controls, judicial supervision or input or any opportunity by the defendant to vacate the writ.[1] To obtain a writ, a plaintiff or his attorney need only submit the most skeletal perfunctory affidavit, conclusory in form and completely devoid of allegations of evidentiary facts.[2] Submission of the affidavit is made to a non-judicial clerk whose ministerial duty it is to issue the writ. The writ then stands inviolate unless and until the defendant obtains a judgment on the merits after a plenary trial.

It is difficult to perceive the logic of the argument that the declaration of the unconstitutionality of the Georgia statute is "dispositive of this case". The New York statute provides a procedure under which judicial supervision jealously guards the rights of a defendant both upon the initial application for attachment and thereafter throughout the entire attachment procedure. The New York procedure (in contrast to the Georgia procedure and, indeed, even the Louisiana procedure[3]) requires the plaintiff to present for consideration and review by a judge of a court an affidavit and other written evidence showing that there

---

[1] The sole course open to a defendant in Georgia is to post a bond as substitute security. Ga. Code Ann. § 46-401. He has no opportunity prior to judgment to challenge the *bona fides* of the writ itself.

[2] See fn.2 to Justice White's opinion in *North Georgia* at 43 L.W. 4193 where such an affidavit is set forth in its entirety.

[3] See opinion of Justice Stewart dissenting in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) at page 629, in which he points out that the requirement of affidavit in Louisiana is satisfied by "*pro forma* allegations".

is a cause of action and that grounds for attachment exist (New York CPLR 6212(a)). The plaintiff has the burden of proving by his evidentiary submissions a *prima facie* case (a) that he has a cause of action and (b) that he has valid grounds for attachment (see decisions cited at page 10 of the Curtis and Continental Jurisdictional Statement). Only upon the determination of the judge to whom such evidence has been submitted that such a *prima facie* case has been made, will the order of attachment issue. The defendant then has the right to an immediate hearing by moving to vacate the attachment (CPLR 6223).[4]

Upon the hearing, the judge[5] determines whether the plaintiff has carried the burden of making out a *prima facie* case (a) that he has a cause of action and (b) that he has grounds for attachment. If the defendant presents no new evidence, the determination will be based upon the evidence already presented by the plaintiff. If the defendant presents his own evidence, the determination will be

---

[4] At page 4 of appellees' brief, a highly selective portion of this section is quoted in an effort to perpetuate the erroneous conclusion of the District Court below that the only ground upon which a defendant may have a hearing is "that the attachment is unnecessary to the security of the plaintiff". A reading of the entire section as well as the Legislative Studies pertaining to the same and the decisions of the New York courts demonstrates that the defendant can move to vacate on *any* ground showing plaintiff's lack of entitlement to an attachment. See fn.2 at page 11 of the Jurisdictional Statement filed by Curtis and Continental.

[5] In New York County (where the attachment in this case originally issued), in Westchester County (where the same State Court action is presently pending by virtue of a change of venue sought and obtained by appellees) and in other populous counties in the State of New York, the judges are assigned to Special Term Parts and rotate in such assignments typically on a weekly basis. One of such parts is designated for *ex parte* motions and another of such parts is designated for motions on notice. Consequently, the hearing on a motion to vacate almost always comes on before a judge other than the one who issued the order in the first instance and a defendant can guarantee a hearing by a new judge by the timing of his motion.

based upon the entire record before the judge. In this procedure, the burden of proof is always upon the plaintiff (see cases cited at page 10 of the Curtis and Continental Jurisdictional Statement).

Second, in a tortured effort to bring this case into the sphere of *North Georgia,* appellees assert that the New York statute "makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted . . . ." (Appellees' Brief page 9). The assertion is either most patently erroneous (as New York CPLR 6223 clearly affords defendant the right to an immediate hearing) or, at best for appellees, it completely ignores one of the most substantial issues on this appeal: whether the hearing, in the context of the entire New York statutory scheme, satisfies due process. The decision in *North Georgia* is clearly irrelevant to any determination of that issue. Georgia, unlike New York, literally had "*no* provision . . . for *any* hearing".

The keystone of the District Court's decision is its finding that defendant has the burden of proof on the hearing to vacate an attachment. This finding is based upon some very serious misapprehensions, *inter alia,* a misapprehension of the language of CPLR 6223 (see fn.2 at page 11 of the Jurisdictional Statement filed by Curtis and Continental), a misapprehension of the interpretation of that section by the New York courts (see page 10 of the Jurisdictional Statement filed by Curtis and Continental), and an apparent confusion in distinguishing "burden of proof" from "burden of going forward" (*id*). If in fact there be no substantial issue arising out of this phase of the District Court decision, then disposition of the case at this stage would require reversal, not affirmance. If there be a substantial issue, then full briefs and oral argument are required.

Finally, appellees have not addressed themselves to other substantial issues raised in the Jurisdictional Statements filed herein, e.g., whether a vendor's lien is a *sine qua non* of due process in pre-judgment seizures or whether fraud can ever form the basis for a pre-judgment seizure.[6]

---

[6] At fn.5, p. 9 of their brief, appellees assert, ". . . The Georgia statute . . . similar to the Louisiana statute upheld in *Mitchell* . . . 'requires plaintiff to file a bond in a sum double the amount sworn to be due' ". The Louisiana statute has no such requirement (see La.C.C.P. Art. 3506). Rather, similar to the New York statute, the court in Louisiana fixes the amount of the bond.

At fn.3, p. 4 of their brief, appellees lament that, in order to discharge the attachment, they would have to post a bond for the value of the property attached, which would be in an amount almost thrice that required of the plaintiff to obtain the attachment. There is little logic to this complaint. The amount of plaintiff's bond is designed to secure the defendant for damages for wrongful taking. The amount of defendant's bond is designed to substitute for the security under attachment which the defendant is permitted to take into its hands. It should also be noted that at any stage of the proceeding before the attached property is applied to a judgment, a defendant can obtain additional security for damages in the event of wrongful taking. CPLR 2508.

At fn.6, p. 10 of their brief, appellees complain about the length of time between commencement of the State action and its placing upon the trial calendar. It ill-behooves appellees to complain of this circumstance as:

> (1) Appellees consistently delayed completion of pretrial discovery proceedings and were twice compelled by orders of the State Court to appear to continue such discovery proceedings;
>
> (2) Appellees made a motion in the State Court to stay all further proceedings in the State action pending determination of their constitutional attack in the Federal Court; and
>
> (3) When the case was placed on the calendar for trial, appellees made a motion in the State Court to strike it from the calendar.

CONCLUSION

The substantial questions presented in the Jurisdictional Statements filed have not been determined, nor are they directly affected, by this Court's decision in *North Georgia Finishing Inc.* v. *Di-Chem Inc.* The motion to dismiss or affirm should be denied and probable jurisdiction noted.

Dated: New York, New York, February 10, 1975.

Respectfully submitted,

PHILIP H. BUSNER,

Attorney for Appellants
Curtis Circulation Company and
Continental Casualty Company

FRED I. SONNENFELD
YOUNG, SONNENFELD & BUSNER
Of Counsel

Supreme Court, U. S.
FILED
FEB 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-858

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District, and CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District, and CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The state appellants* file this Brief in Opposition to the Motion to Dismiss or Affirm pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States,

* In this brief we substitute now Governor Hugh L. Carey for Defendant Malcolm Wilson, who has left the Governorship and note that the Court has filed this appeal with Governor Carey as Appellant.

and to supplement the Jurisdictional Statement heretofore filed in this appeal, 74-858 and the companion appeal, *Curtis Circulation Co., et al.* v. *Sugar*, 74-859.

The appellees in their Motion to Dismiss or Affirm, we believe erroneously, place total reliance on *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 43 U.S.L.W. 4192 (January 22, 1975), to assert that the instant appeal no longer presents a substantial federal question warranting the noting of probable jurisdiction. On the contrary, that case does not impair the substantial character of the questions presented by this appeal but rather demonstrates the vital necessity for this Court to recognizable validity of the process provided for by such statutes as that of New York.

In their Jurisdictional Statement (J.S. 9), the state appellants noted that this Court had granted certiorari in *North Georgia Finishing, Inc.* v. *Di Chem, Inc.*, 417 U.S. 907. We also pointed out that the matter involved prejudgment garnishment (or attachment) *without* a court or judge's order. (J.S., p. 9, ftn.). After submission of the Statement (January 13, 1975), the Court rendered its decision in *North Georgia Finishing, supra.* In reversing the judgment of the Georgia Supreme Court, 231 Ga. 260, 201 S.E. 2d 321 (1973), this Court stated that the Georgia statute was not saved by *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974). The statute, Georgia Code Annotated § 46-101, as stated by the opinion of this Court,

> ". . . has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. § 46-103. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizable bank account was frozen, and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." 43 L.W. at 4194 (ftn. omitted).

However, as recognized by even the District Court opinion, now reported at 383 F. Supp. 643, the New York statute, CPLR Art. 62, undoubtedly contains four of the five "procedural assurances" contained in the Louisiana statute, 383 F. Supp. at 647, and cited approvingly in *Mitchell.* It only concluded that the immediate post-attachment hearing, provided by CPLR 6223, did not come up to *Mitchell* standards, *supra* at 648-650.

Yet, the facts of this case and New York practice require that before attachment issues, the judge determines whether the plaintiff has (1) a cause of action and (2) grounds for attachment. The companion brief in opposition of the appellants Curtis Circulation Co., *et al.*, as well as our Jurisdictional Statement, p. 8, demonstrates that the attaching plaintiff has a significant burden of proof. Properly analyzed New York via CPLR 6212 and 6223 provides all the procedural and substantive protections the Louisiana statute provided, La. Code of Civil Procedure 3506. Of course, the Georgia statute failed to provide any "provision for an early hearing . . ." 43 L.W. at 4194. Indeed this would be dispositive of the unconstitutionality of the Georgia statute, rendering further analysis unnecessary and, therefore, dicta.

There is no doubt that "(p)laintiffs, to obtain an attachment under New York law, which governs, are required to establish prima facie the existence of a cause of action . . .",

Aerotrade, Inc. v. *Banque Nationale de la Republique D'Haiti*, 376 F. Supp. 1286, 1287 (S.D.N.Y. 1974). Whether on notice or *ex parte*, this is not a pro forma matter. See also, as to grounds for attachment, *Maitrejean* v. *Levon Properties Corp.*, 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974), J.S., p. 8; *Eaton Factors Co., Inc.* v. *Double Eagle Corp.*, 17 A D 2d 135, 232 N.Y.S. 2d 901 (1st Dept. 1962). The latter case fully demonstrates the careful scrutiny courts place an attachment under on a motion to vacate. This is followed by the New York federal courts applying the law also. *Reeda* v. *Mastercraft Electronics Corp.*, 297 F. Supp. 815, 820 (S.D.N.Y. 1969).

Undoubtedly, under the exacting New York procedure, requiring judicial supervision•, the creditor has already proof "of the grounds on which the writ was issued." The judicial nature of the issuance of attachment in New York requires the creditor to establish "probable cause . . ." for the attachment. Given this state of the law, supported by the actual factual pattern of the instant case, the attaching plaintiff has already sustained a substantial burden in obtaining the writ, warranting shifting the burden (of going forward) on a CPLR 6223 motion to the defendant.

New York's attachment statute is a carefully drawn statutory scheme, available only in specified instances,•• balancing the interests of both parties, in a manner, beyond cavil, similar to the Louisiana statute upheld in *Mitchell* v. *W.T. Grant Co., supra.*

• To quote the dissenting opinion in *North Georgia* (ftn. 4, p. 8, Motion to Dismiss or Affirm) as authority that the "clerk-judge distinction is of little significance" totally ignores the great significance the opinion of the Court places on it. (43 L.W. at 4194).

•• N.B. that Georgia garnishment is available in any pending civil action. *Morrow Electric Co., Inc.* v. *Cruse*, 370 F. Supp. 639, 640 (N.D. Ga. 1974).

CONCLUSION

Probable jurisdiction should be noted.

Dated: New York, New York, February 11, 1975.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,
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and

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BRIEF FOR APPELLANTS CAREY, FINE, BEISHEIM AND ATTORNEY GENERAL *PRO SE*

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Supreme Court of the United States

OCTOBER TERM, 1975

74-858
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HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

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BRIEF FOR APPELLANTS CAREY, FINE, BEISHEIM AND ATTORNEY GENERAL *PRO SE*

Opinions Below

1. Opinion of the District Court, convening three-judge court. 377 F. Supp. 1055, June 17, 1974 (J.S. 19a).*

2. Opinion of three-judge District Court declaring New York Civil Practice Law and Rules 6201(4), (5) and (8) unconstitutional. 383 F. Supp. 643, October 17, 1974 (J.S. 1a).

3. Probable jurisdiction noted. —— U.S. ——, 43 L. Ed. 2d 773, April 14, 1975.

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The judgment appealed from was entered November 6, 1974 (J.S. 31a). Notices of Appeal were filed on November 27 and 29, 1974 (J.S. 33a, 35a). Probable jurisdiction was noted April 14, 1975, Opinion Below.

Questions Presented

1. Does New York Civil Practice Law and Rules, Article 62, 6201 *et seq.*, violate any due process requirements of the Fourteenth Amendment to the United States Constitution in the procedure provided for the issuance of judicially supervised orders of attachment?

2. Is there a lack of a meaningful opportunity to vacate orders of attachment in New York?

(a) Is the "burden of proof" really on appellees in moving to vacate, and is such a burden the dispositive due process consideration on such motions?

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* Numbers in parentheses refer to Appendix (a) or Appendix to Jurisdictional Statement (J.S. a).

3. Is the existence of a vendor's lien or possessory interest crucial to the constitutionality of an attachment statute?

Statute Involved

New York Civil Practice Law and Rules (CPLR), Article 62 (6201 *et seq.*) (Attachment) (reproduced in full at J.S. 37a-49a).

The specific portions of Article 62 set out in Appendix A to this Brief are: CPLR 6201, subd. (4), (5) and (8) but including all of 6201; 6211, 6212, 6222, and 6223.

Statement of the Case

The instant action was instituted to challenge the constitutionality of an attachment granted by a New York state court on the grounds specified in New York Civil Practice Law and Rules (CPLR) 6201(4), (5) and (8). The plaintiffs-appellees claim that such an attachment of their property granted *ex parte* violates their Fourteenth Amendment rights to due process. Federal jurisdiction was alleged under 28 U.S.C. §§ 1331(a) and 1343(3) and (4).

In August, 1971, Champion Sports Publishing Inc. ("Champion") through appellee Bert Sugar entered into a written agreement with appellant Curtis Circulation Company ("Curtis") (42a). It provided that Curtis would distribute magazines for Sugar and Champion. Under the agreement, Curtis was to and did make advances to Champion which, by virtue of the contract, Curtis was entitled to recoup from moneys received by Champion as a consequence of the distribution of the latter's magazines (55a-56a). The agreement was to run five years.

In accordance with the agreement Curtis advanced between August, 1971 and December, 1972 over $100,000 to

Champion (42a). According to the affidavit of Stuart J. Friedman, in support of the application for the order of the attachment in the State Supreme Court (42a-44a) it was believed that Sugar caused Champion and appellee Wrestling Revue to enter into an operation to defraud Curtis of its rights as a creditor. Six of the publications subject to the agreement were transferred by Champion to Wrestling for no consideraiton in November, 1972. Wrestling thereupon sold the publications to an independent third party for a consideration, none of which was paid to Champion (43a). There was a licensing agreement, which was either a fraud or contrivance to avoid the agreement between Champion and Curtis (44a). Curtis stated the basis of the above allegations as information obtained in meetings between the attorneys for the third party, National Sports and Curtis on March 2, 1973 (44a). After the several assignments Champion had no assets (45a). Thus Champion had received large sums of money from appellant Curtis, but stripped itself of assets so as to be unable to repay (46a, 50a). As of February 28, 1973, Curtis had advanced payments of $28,588.08 which had not been recouped. It sought the attachment for that amount (45a).

Curtis knew nothing of the alleged ownership of the publications by Wrestling. It thought they were Champion's. This was alleged to be fraud (52a). The complaint, stating several causes of action in fraud and breach of contract was annexed to the moving papers for the order of attachment (47a-54a).

Having learned all this, Curtis notified National Sports to withhold payment (36a). National did so (16a, 37a). Wrestling sued National, March 5, 1973 (16a, 36a-37a). Then Curtis sued Sugar, Wrestling and Champion, April 13, 1973 (16a). Curtis also obtained the order(s) of attachment, the subject matter of the federal action and the instant appeal (39a-41a), pursuant to grounds found in

CPLR 6201(4), (5) and (8). This, of course, was *ex parte* and by order of a Justice of the Supreme Court of the State of New York Sidney A. Fine, one of the appellants herein.

The application was grounded on three alternative grounds all involving elements of fraud and deceit. One ground was based on CPLR 6201, subparagraph (4):

> "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."

to wit:

> (a) "Champion Sports has assigned disposed of or removed property from the State of New York with intent to defraud its creditors".

The second ground was based on Subparagraph (5):

> "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability".

to wit:

> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" and

The third ground was based on Subparagraph (8):

> "there is a cause of action to recover damages for the conversion of a personal property, or for fraud or deceit".

to wit:

> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit".

It was supported by the affidavit of Stuart J. Friedman, (Corporate Secretary of Curtis) (41a-46a), a complaint (47a-54a), a copy of the contract (55a-57a), and a financial work sheet (58a) (§ 6212[a]). Also a bond of $10,000 was posted (§ 6212[b]). This was in an amount set by the State court to cover damages in the event of wrongful attachment (§6212[b]).

Rather than moving under § 6223 to vacate the attachment the state court defendants (Sugar and Wrestling Revue) instituted the instant action in federal court to, in effect, review the action of the state court in granting the attachment.*

Prior Proceedings

Upon filing the complaint in federal court, the plaintiffs-appellees applied for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The appellants Curtis and Continental opposed and moved to dismiss. The single judge District Court, despite the holding of *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) and recognizing the numerous similarities between the New York law and the Louisiana statute upheld in *Mitchell*, denied the motion to dismiss and convened a three-judge court (J.S. 15a, 377 F. Supp. 1055). In passing, the single judge (LASKER, D.J.) rejected claims that the money which had been attached was being withheld anyway (J.S. 17a-19a) so as to avoid the constitutional claim and that the federal court should defer to the state court which had issued the attachment, where there was an action pending and could decide the issues (J.S. 19a-22a). After recognizing the similarities, the convening decision saw the creditor in *Mitchell* as having a (1) possessory interest and vendor's lien in the property

* The pendency of the state court action and the obvious multiplicity of suits, raises a serious issue as to whether comity and federalism required dismissal of the federal action. *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 43 L. Ed. 2d 482 (Mar. 18, 1975).

attached and (2) the proof of the above could readily be established on documentary proof. Judge Lasker did not see the challenged New York provisions as capable of such simple proof (J.S. 29a).

Upon presentation to the three-judge court, Judge Lasker again wrote the opinion and struck down the New York attachment statute. Continuing the point-by-point comparison to the Louisiana statute upheld in *Mitchell, supra,* the opinion stated that CPLR 6223 ("vacating or modifying attachment") is the sole mechanism available to the defendant to vacate an attachment and it did not meet the standards of *Mitchell,* Art. 3506, Louisiana Code of Civil Procedure (La. C.C.P.) (J.S. 8a). It held that the sole basis of vacating an attachment in New York under the CPLR was that the attachment "is unnecessary to the security of the plaintiff", and the burden is on the defendant moving to vacate, not the plaintiff, as in *Mitchell* (J.S. 9a).

Furthermore, it was asserted that appellant Curtis never had a legally cognizable, concurrent possessory interest in the property attached. It only had a claim of fraud (J.S. 10a).* The question of fraud was seen as "ill-suited" for preliminary *ex parte* determination.

In summary, *Mitchell* was seen as a narrow exception to the "general rule" of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and the statute, CPLR 6201 (4), (5) and (8), was invalidated by the general *Fuentes* rule.

However, the CPLR was found unconstitutional only to the extent "a New York defendant has no meaningful opportunity to vacate an order of attachment . . ." (J.S. 12a).

* Curtis may very well have had a lien on the moneys attached, as it had advanced them to Champion under a contract. This could be said to be an equitable lien created by implication. 35 N.Y. Jur., *Liens,* § 15.

The holding, as being based on the asserted lack of a meaningful opportunity to vacate the attachment, was confirmed by the signing of a judgment enjoining enforcement of CPLR Article 62, 6201(4), (5) and (8) "until and unless a meaning opportunity to vacate an attachment is provided . . ." (J.S. 32a). The Sheriff was ordered to release the attachment. However, the judgment was stayed on condition the defendants file a notice of appeal to the Supreme Court (32a).

The defendants, all except the Sheriff, who never appeared, did appeal (J.S. 33a, 35a) and this Court noted probable jurisdiction on April 14, 1975 —— U.S. ——, 43 L. Ed. 2d 773.

The Background of Attachment

The provisional remedy of attachment is found in the Civil Practice Law and Rules, Article 62, which itself was a simplification and modification of the former Civil Practice Law, §§ 902-973. Attachment can be used to perform two separate functions, although both can be found in certain cases. One is to establish a jurisdictional basis which allows the court to act when personal jurisdiction cannot be obtained. The second is to provide the plaintiff with security for the satisfaction of any judgment he might obtain in the action. An attachment order allows the Sheriff to levy on defendant's property. CPLR 6211.

The instant action is concerned with attachment for security purposes, the second example above. Such an attachment preserves a *res* out of which to satisfy a judgment should plaintiff prevail because it seems likely he will have difficulty enforcing his judgment. See generally 7A Weinstein-Korn-Miller, *New York Civil Practice*, ¶ 6201.01 *et seq.*

In New York, attachment is statutory in origin. *Penoyar* v. *Kelsey*, 150 N.Y. 77, 44 N.E. 788 (1896). It is issued

only by a judge, in strict compliance with the law, *Penoyar, supra.* Even then the judge must exercise discretion. Indeed the word "may" in the first paragraph of CPLR 6201 makes it clear the judge must exercise discretion. Attachment never is granted as of right. If the attachment serves none of the two purposes specified above, it is vacated. *Elliott* v. *Great Atlantic & Pacific Tea Co.*, 11 Misc 2d 133, 171 N.Y.S. 2d 217 (N.Y. City Ct., 1957), affd. 11 Misc 2d 136, 179 N.Y.S. 2d 127 (App. T., 1st Dept. 1958).

Summary of Argument

I. The District Court, in declaring New York's attachment statute unconstitutional, proceeded on several fallacious assumptions, which ultimately led to an erroneous result. Under CPLR 6223, attachment may be vacated on several grounds, including that the attachment is unauthorized in the action or that the grounds for attachment are insufficient. The District Court's contention that the only grounds to vacate are that the attachment "is unnecessary to the security of the plaintiff" is not correct and rebutted by numerous decisions in New York.

The issues on the motion to vacate (CPLR 6223) are as broad as in Louisiana in the statute approved in *Mitchell* v. *W. T. Grant Co.* (La. C.C.P. 3506). In neither case are the ultimate merits of the action inquired into. In both cases, the grounds for sequestration or attachment are tested with the burden on the plaintiff to justify the initial grant of the writ.

The plaintiff must show "facts" to justify the issuance of the writ and if they are contested by defendant (burden of going forward) justify his grounds further (the burden of proof). In any event, the issue of where the burden is placed on a motion to vacate is not of constitutional significance. Due process is a flexible concept which is well served by the New York statute.

II. It is not proper to confine the writ of attachment to instances where the plaintiff holds a pre-existing property interest lien in the property attached. There is absolutely no support for the curious notion of the District Court that the remedy of attachment must constitutionally be confined to those having such a pre-existing property interest. Historically the attachment procedure has been available in both state and federal courts to plaintiffs without regard to such pre-existing property interest, conserving of property to satisfy a judgment in the subsections of New York's statute at issue, § 6201 (and the others) is a sufficient basis, and overcomes any debtor interest in immediate access to property. Protection against fraud is an important state interest. Inquiry into "intent" is highly protective of debtors, and more so than in Louisiana.

This Court's decision in *Di-Chem* does not afford support to this notion since this Court did not mention the lack of a vendor's lien as a defect in the Georgia garnishment statute. The District Court failed to consider that grounds for attachment must be viewed within the flexibility due process undoubtedly possesses.

POINT I

There is no basis under *Mitchell* and *Di-Chem* to constitutionality challenge the State's commercial protective procedure of attachment upon due process grounds. On the contrary the statute affords a defendant ample basis for challenge and requires a judge to be satisfied that a *prima facie* showing of merit has been made by a plaintiff.

As has been noted by this Court, the constitutional validity of pre-judgment provisional attachment or garnishment remedies, granted *ex parte,* has been a continuing matter of concern. For the fourth time in less than four years, the due process aspects of a long-accepted provisional remedy is brought up for plenary consideration. See *North*

Georgia Finishing, Inc. v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975), dissent of BLACKMUN, J., 42 L. Ed. 2d at 761. The instant appeal present the substantial question of the adequacy of a statutory provision for vacating or modifying attachment granted initially *ex parte* by a judicial officer who must be satisfied that procedural requirements and adequate merit has been presented to him.

There is no doubt that primarily, or perhaps exclusively (in view of the judgment signed below), the three-judge District Court declared CPLR 6201(4), (5) and (8) unconstitutional, not because of any constitutional due process flaw in the initial granting of attachments. Rather the attachment granted was deemed unconstitutional because of the alleged inadequacy of the *vacatur* machinery. CPLR 6223.

A. The District Court Erroneously Limited the Basis for Vacatur to "Unnecessary Security".

Here unconstitutionality was not premised on what Section 6223 said but rather on what it did not say. Based upon its reading of New York decisional law, the three-judge District Court concluded that the sole basis for vacating an attachment is (1) "not that the grounds . . . are unproven, but the attachment 'is unnecessary to the security of the plaintiff' " and (2) the burden of proof is on the defendant moving to vacate (J.S. 9a).

Both propositions contain basic fundamental errors as to the State of New York law, even assuming *arguendo,* that the points are of constitutional significance in light of *Mitchell* and *Di-Chem.* These errors of the District Court in reading state law have been pointed out in several state court decisions rendered since the opinion under review. None have accepted the three-judge court's conclusion that there is no meaningful opportunity to vacate an attachment via Section 6223. This is so as these state cases demon-

strate that the "necessity" of the attachment is not the sole grounds for vacating an attachment in New York.*

Thus in *Regnell* v. *Page,* New York Law Journal (N.Y.L.J.) May 23, 1975, p. 14, c. 2 (Sup. Ct., N.Y. Co. FEIN, J.) (reproduced in full as an appendix to this brief) the state court noted the reliance of the *Sugar* court on the "unnecessary to the security of plaintiff" ground (CPLR 6223) as the sole basis for vacating an attachment. In reply, it said:

> "Such an interpretation, however, misconstrues the statute. A motion to vacate under CPLR 6223 on the ground that the attachment is unnecessary to the security of the plaintiff is but one of several available bases. Vacatur may be premised on the grounds among others, that the attachment is unauthorized in the action, or that the ground for attachment relied upon is insufficient".

If the facts are challenged on defendant's motion to vacate, an appropriate hearing can be ordered *Regnell* v. *Page,* N.Y.L.J. July 9, 1975, p. 11, c. 7, at c. 8, and *Regnell, supra.*

Authoritative on this point of availability of several and additional grounds is also *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974). There the plaintiff obtained an attachment, in part pursuant to CPLR 6201(4), removing property (or about to) with intent to defraud creditors, one of the subsections at issue. On appeal, it was said:

> "As respects defendant Levon, plaintiffs have failed to establish any intent to defraud creditors. Such in-

* The decision (J.S. 8a), calls section 6223 the "sole mechanism available to a defendant who seeks to vacate the attachment". This, in a sense, is erroneous as CPLR 6222 permits discharge of the attachment by posting a bond. Vacatur (6223) or discharge (6222) have the same ultimate purpose—i.e., ending the attachment.

> tent may not be presumed from the mere disposition or removal of property (*Eaton Factors Co.* v. *Double Eagle Corp.,* 17 A D 2d 135)."

Or as propounded in *Macmillan, Inc.* v. *Hafner,* 42 A D 2d 533, 344 N.Y.S. 2d 729 (1st Dept. 1973), where an appeal also was taken on denial of a motion to vacate an attachment:

> "At best, respondent presented but a scintilla of proof as to the requisite elements of the fraud cause of action alleged in the complaint. Such a perfunctory showing falls short of the requirements to support the drastic remedy of attachment".

Another decision vacating an attachment, apparently granted under section 6201(8), according to the opinion* is *Richman* v. *Richman,* 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973), where that state appellate court said:

> "The warrant [attachment] was issued 'for the wrongful and unlawful conversion of personal property and/or for fraud or deceit; and is an action upon a contract or stipulation wherein defendant has been and is, guilty of fraud and deceit in contracting and incurring said liability.' The only affidavit in support thereof, while using the conclusory words 'false and fraudulent', fails to set forth facts to sustain such allegations and the affidavit, when read in its entirety, at best, spells out an action for specific performance due to a breach of (stipulation) contract. * * * The present record is totally insufficient to sustain the issuance of the writ . . ."

See also *Martin Enterprises, Inc.* v. *M. S. Kaplan Co.,* 45 A D 2d 883, 358 N.Y.S. 2d 160 (2d Dept. 1974), where it

* However we read it as also grounded in section 6201(5), although the papers did not designate under what subdivision of section 6201 the proceeding was commnced.

was said in vacating an attachment:

> "The affidavits, complaint and exhibits establish nothing more than that appellant held a controlling number of shares in the corporation with which plaintiff contracted. *There is not the least bit of evidence to establish the commission of the intentional torts pleaded.*" (Emphasis supplied)

Attachment may fail due to *forum non conveniens*, as another example. *Sutton* v. *Garcia,* 80 Misc 2d 690, 363 N.Y.S. 2d 695 (Sup. Ct., N.Y. Co. 1974). On wrong forum, *Gaskin* v. *Stumm Handel GmbH,* 390 F. Supp. 361, 363 (S.D.N.Y. 1975).

In fact the District Court's citation of cases (J.S. 9a) on "the sole basis" or burden of proof rests on nonresident defendant attachment decisions, *Hydromar Corp. of Delaware* v. *Construction Aggregates Corp.,* 32 A D 2d 749, 300 N.Y.S. 2d 797 (1st Dept. 1969); *George A. Fuller Co.* v. *Vitro Corp. of America,* 26 A D 2d 916, 274 N.Y.S. 2d 600 (1st Dept. 1966).* In these cases the "necessary to security of plaintiff" grounds is a matter that lies peculiarly within the defendant's knowledge. *Cf. Maitrejean, supra,* as to assets of foreign corporation.

Another experienced state court judge in *New York Auction Co.* v. *Belt,* N.Y.L.J. April 9, 1975, p. 17, c. 3 (Sup. Ct. N.Y. Co., *Silverman,* J.), also stated that *Sugar* had misinterpreted New York law:

> "Furthermore, the Sugar case seems to have proceeded on the assumption that an attachment may only be vacated in New York on a showing that it is not necessary for security purposes, and not because the plaintiff is unable to prove the grounds on which the

* There is language in *Freedman* v. *Wilson Securities Corp.,* 31 A D 2d 627, 295 N.Y.S. 2d 789 (1st Dept. 1964), that the "unnecessary" clause can apply to all attachments.

attachment was issued, as the Mitchell case seems to require. In this respect, I think the court in the Sugar case misinterpreted the laws of the State of New York. It is an established practice in this State to vacate attachment not only where the attachment is unnecessary for security purposes, but also where it appears either that the plaintiff does not have a meritorious case or that the defendant is not a nonresident or foreign corporation. (cits. omitted).

"The court in the *Sugar* case relied upon the following sentence in CPLR 6223: 'If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment'. Apparently, the court in the *Sugar* case thought that was the only ground for vacating an attachment. But, the legislative history makes clear that this is merely an additional ground added to the existing ground for vacating an attachment in situations where an attachment initially used to obtain jurisdiction is no longer necessary for that purpose. See Third Preliminary Report, Leg. Doc. No. 17, p. 358 (1959); cf. McKinney's Supplementary Commentary (1964) to sec. 6223 at Supp. p. 47; *Data Realty Inc.* v. *Sciacca* (App. Term 2d Dept.) NYLJ, p. 22, col. 5 (May 18, 1970). It is the first sentence of CPLR sec. 6223 which is the successor to sections 948 and 949 of the Civil Practice Act (Sixth Report) on the Revision of the Civil Practice Act, Leg. Doc. No. 8, p. 591 (1962), and like those sections, seems to provide the defendant with a right to move to vacate the attachment on the ground that it is not authorized by the statute, including because the plaintiff is unable to prove that the defendant is a nonresident or foreign corporation." (cits. omitted).

B. Contrary to the District Court, the state law does provide a meaningful opportunity to vacate.

The District Court in its opinion below dwells at great length on the notion that a motion under § 6223 does not go to the ultimate merits (J.S. 9a-10a) and therefore concludes that the motion to vacate does not provide a "meaningful opportunity" to defendant. This ignores the fact that attachment is a "provisional remedy" which is not granted because the plaintiff is bound to prevail on the merits, but rather because there is a demonstrated need to preserve assets pending the conclusion of the action. Indeed, the plaintiff who obtains an attachment (CPLR Art. 62), does not receive possession of defendant's property but the attached property remains in possession of the sheriff. The District Court ignored or overlooked the important fact that the plaintiff must present "prima facie the existence of a cause of action" and "(t)he essential elements of the cause of action must be supported by evidential proof." *Aerotrade, Inc.* v. *Banque Nationale De La Republique D'Haiti,* 376 F. Supp. 1286, 1287 (S.D. N.Y. 1974).

The same type of hearing, on the grounds for attachment, is given under Louisiana C.C.P. Section 3506. The trial of the merits of the action is not involved under the Louisiana statute (and *Mitchell*) and equally so in New York under CPLR § 6223. See *Tucker & Schonekas* v. *Al Dohmann Chevolet, Inc.* (La. App.), 260 So. 2d 99, 100-101 (1972):

> "Official Revision Comment (c) under Article 3506 states that only the grounds for the auxiliary remedy, i.e., dissolution of the writ and damages for wrongful sequestration may be inquired into on the motion to dissolve and not the merits of the main demand".

Thus, both in Louisiana as approved in *Mitchell,* and New York, under CPLR 6223, a defendant may not present defenses to the complaint to vacate the attachment

but can only contest the adequacy of plaintiff's proof for granting attachment. Furthermore such a limitation on issues to be litigated at a preliminary stage does not make the procedure unconstitutional. See *Lindsey* v. *Normet,* 405 U.S. 56, 64 (1972), cited in *Mitchell* at 607, where this Court held it was "unable to conclude that . . . limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment". See also, 88 Harvard Law Review 71, *The Supreme Court, 1973 Term,* 76, n. 35.

C. Burden of proof is on the plaintiff. It is the burden of going forward that is on a defendant.

The hearing provided in New York (§ 6223) is as broad as the hearing in Louisiana. The only rational distinction is in the fact that the "burden of proof" is stated in Louisiana as on the plaintiff when a motion to vacate is presented (C.C.P. 3506) while in New York the defendant, who makes the motion is, commonly said to have the burden, although not so stated in the statute. See generally Weinstein-Korn-Miller, 7A *New York Civil Practice* ¶ 6223.05. However this statement of where the burden lies is a simplification, which is of form, not substance. See, *infra.*

In actuality the burden of proof to show entitlement to attachment rests on the plaintiff-moving party. This includes showing of a *prima facie* case. This is verified by numerous New York decisions.

As cited in *Regnell, Stines* v. *Hertz Corp.,* 22 A D 2d 823, 254 N.Y.S. 2d 903 (2d Dept. 1964), affd. 16 N Y 2d 605, 261 N.Y.S. 2d 59 (1965) states:

> "While the court is not required to decide the merits of a controversy on a motion to vacate an attachment 'the attachment papers must contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated (*Krellberg* v. *Gregory,* 10 A D 2d 824), where the complaint

and affidavits fail to establish a prima facie cause of action, or where they clearly establish that the plaintiff must ultimately be defeated', the attachment must be vacated (*American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N.Y. 322, 325)."

See also *Macmillan, Inc.* v. *Hafner, supra.* 42 A D 2d 533, 344 N.Y.S. 2d 729.

In New York, the party seeking the attachment has to carry a significant burden of proof in order to convince a judge to exercise his *discretion* and grant an *ex parte* order. The litigant *"shall show"* (6212[a]) that he has a cause of action and grounds for attachment exist. This is fundamental. This is not a mere formality. This was pointed out by District Judge Weinfeld in the *Aerotrade* case, *supra,* where he pointed out that the federal court follows the state procedure on attachment and insists upon this showing of merits by plaintiff (see also, 376 F.Supp. at 1288): "Upon the record presented there is sufficient doubt that plaintiffs have *prima facie* established their claims as to warrant denial in the exercise of the court's discretion of the motion for the issuance of a warrant of attachment"). As to grounds, see *Eaton Factors Co., Inc.* v. *Double Eagle Corp.,* 17 A D 2d 135, 232 N.Y.S. 2d 901 (1st Dept. 1967).

And the facts of the instant case show this to be the case. The complaint in the state court stated a number of well-pleaded causes of action for fraud (47a-58a), and the affidavit in support of attachment contained specific reasons for the attachment based on information and belief together with the basis of the affiant's statements (44a-45a). Indeed, the affidavit was characterized by the opinion below as "extensive and detailed" (J.S. 2a).• Attachments

• This was hardly the case in *Mitchell* v. *W.T. Grant, supra,* 416 U.S. 600 at 605, 616, where La. C.C.P. 3501 provides for an

(*footnote continued on following page*)

under New York law are not granted on perfunctory allegations.

And, when the motion to vacate is made, while the courts on the motion to vacate do not actually try the merits of the case, they do delve into plaintiff's showing of entitlement. To quote *Boston Old Colony Ins. Co.* v. *Bianchi,* N.Y.L.J., February 26, 1975, p. 16, c. 1 (Sup. Ct. N.Y. Co. *Helman* J.):•

"On the present application [under 6223] elaborate affidavits and exhibits have been submitted on both sides bearing on the factual and legal issues involved, so as to provide movant with a full and fair hearing. While conflicts exist, there can be little doubt that the plaintiff's supporting affidavits establish prima facie, a showing of fraud and conversion, sufficient to charge defendant with responsibility and culpability in the activities complained of by plaintiff."

In light of the fact that the plaintiff has sustained a significant burden of proof in initially obtaining the order, on a motion to vacate it is not at all unreasonable that the defendants have a burden of "going forward", to dispute the basis of the attachment by showing that it was unauthorized. This may be called a "burden of proof" (J.S.

(*footnote continued from preceding page*)

affidavit showing "the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specifications . . ." However, as stated in the dissent of Justice Stewart, 416 U.S. at 632, "(t)he Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court". And at 633—". . . issuance of the summary writ becomes a simple ministerial act" and footnote 4 thereto.

It also was not the case in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* —— U.S. ——, 42 L. Ed. 2d 751, 756, n. 2.

• This is another state court decision rendered since *Sugar* that has declined to follow it.

9a), but is seen as really the burden of going forward. The plaintiff must always in the end justify his right to attachment as the cited cases establish.

Apart from that, the reliance below upon the burden of proof on vacatur has not the crucial significance as to the constitutionality of granting *ex parte* attachments* accorded to it on the disposition by the District Court. When attachments are granted as a matter of course on routine affidavits, some significance may be placed upon the burden of proof at a vacatur hearing. This was the case in *Mitchell*,** and *Di-Chem*. But given the significant initial and ultimate burden of the plaintiff in New York (to persuade the judge to exercise his discretion and grant attachment) the fact that the burden of going forward shifts during the proceeding is clearly not of constitutional significance. *United States* v. *Illinois Central R.R. Co.*, 291 U.S. 457, 463-464 (1934).

Flexibility in deciding what due process requires is the keynote of *Mitchell*. The decision below treated *Mitchell* as

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* As was said by Joseph M. McLaughlin, *New York State Trial Practice*, New York Law Journal, November 8, 1974, p. 1, at p. 4, c. 1 (Mr. McLaughlin is Dean of the Fordham Law School in New York and the author of the Practice Commentary to the CPLR Art. 62):

> "Properly analyzed the only substantive difference between the statute sustained in *Mitchell* and the CPLR provision lies in the burden of proof. Whereas in *Mitchell*, the burden that the seizure was authorized rested upon the attaching creditor, under New York law the burden rests upon the defendant debtor to show that the attachment is unauthorized. The ultimate question, therefore, is whether this difference in burden of proof is of constitutional proportions. This writer remains unpersuaded that it is." (Footnote omitted.)

** It must be recognized that in *Mitchell* in every county, save the one where the writ of sequestration was issued, the court clerk was the issuing agent. It cannot be presumed the state judge in *Mitchell* applied higher standards than the court clerk in other counties, when granting the sequestration.

setting inflexible standards without any consideration of the highly discretionary nature of attachment in New York and the practical difficulty of obtaining such a "drastic remedy", *Macmillan, Inc.* v. *Hafner* (*Mitchell*, 416 U.S. at 610), *supra*. Considered "as a whole", the New York procedure has made a constitutional accommodation of the respective interests of the parties to the litigation. On issues of interpreting state law and procedures, the state courts, of course, are the ultimate authority. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974) and the District Court should have considered itself bound by the law as set out in relevant New York cases. The error below principally was occasioned by misapplication of the state law.

POINT II

The remedy of attachment is not confined only to creditors holding pre-existing interest in the property subjected to same. There is no basis for any constitutional limitation of the provisional remedy of attachment to those such pre-existing interests.

While a vendor's lien, or claim of ownership of property, may not be in the *sine qua non* of attachment in New York, it is a fanciful notion to claim that thereby there is a violation of due process. In *Mitchell* (416 U.S. at 628) (POWELL, J., concurring), this Court did not find in *Fuentes* (407 U.S. 67), a "Procrustean rule of a prior adversary hearing" before seizure of property. But it did not intend to establish a vendor's lien as a Procrustean condition of attachment. While the existence of a vendor's lien may be easy to establish (*Mitchell* at 609), the interests of debtors and creditors can and must be considered in other situations. The very fact that New York in Section 6201(4), (5) and (8) the grounds for attachment are more difficult to prove than Louisiana's in *Mitchell*

furnish no basis for condemning the New York statute for being more protective of debtors.

In any event, it is necessary to apply a balancing test. The Court's opinion in *Mitchell* recognized that the state's interest in establishing pre-judgment attachment are two-fold. The first is to conserve property which is the subject of dispute from waste or alienation by a debtor which protects the creditor's interests in the property. This preserves credit and enhances the flow of commerce. The second is to avert self-help measures by a creditor, which may be accompanied by violence and retaliation. *Id.* at 605. These themes are considerations in New York's statute making attachment available in specified instances. CPLR 6201 (1) through (8). This is especially so in the instant attachment involving a commercial transaction.

The element of a fraud cause of action found in attachments granted under Section 6201(5) and (8) are easy to determine and do consist of specific elements, all of which are necessary to state a valid cause of action. 24 N.Y. Jur. *Fraud and Deceit,* § 14 (representation of a material existing or pre-existing fact, falsity, scienter, deception and injury). If any of the elements are lacking, there is no sufficient complaint. Such a preliminary determination is properly a judicial function, with the judge exercising his discretion.

While Sections 6201(5) and 6201(8), the two bases for issuance of the state attachment, were not seen in the conveniency opinion below as following *Mitchell* as closely as Section 6201(4), it "presumably embodies the inference that fraudulent activity by a defendant giving rise to a lawsuit may indicate the defendants' willingness to commit fraud to avoid payment of a judgment resulting from the lawsuit" (J.S. 28a). This is echoed in 1973 Practice Commentary (McLaughlin 1973) to CPLR 6211 (7B McKinney's [6001-7700] Pocket Part, pp. 27-28):

> "CPLR 6201(8) authorizes an attachment in an action to recover for conversion of fraud. If the defendant has committed the act charged in the complaint, one can readily predict what his action will be when he notified that the plaintiff is going to seek an order of attachment. Query: If there is a reasonable fear that the defendant will hide his assets to protect them from attachment, is this not a sufficient reason to permit the plaintiff to proceed ex parte?"

Contrary to the absence of judicial scrutiny found to be a constitutional vice in *Di-Chem,* as a preliminary matter in authorizing the attachment, it is necessary for a judge in his judicial capacity to make a determination of the complaint's sufficiency. The granting of an attachment is not a determination of the ultimate merits of the case. By not making the vendor's lien the basic criterion of attachment, New York is more protective of the debtor than Louisiana. In the latter, Louisiana C.C.P. Art. 3571 allows sequestration on a simple claim of ownership, or a mortgage, lien or privilege thereon, "if it is within the power of the defendant to conceal, dispose of, or waste the property of revenues . . ." Note there is no issue as to actual *intent* of the defendant. *Cf.* CPLR 6201(4) which requires 'intent' to defraud", not just the ability or power. And Section 6201(5) requires a contract, which in the instant case was express and part of the application for the attachment (55a-56a).

The grounds on which attachment shall be available is still a matter for the State legislature. As was said in *Rothschild* v. *Knight,* 184 U.S. 334, 341 (1902), that "(t)o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide . . .".

It was not the lack of a vendor's lien or its general availability which led the Court to strike down Georgia's attachment statute in *Di-Chem, supra.* Indeed, the

vendor's lien was not even mentioned. See *Hutchinson* v. *Bank of North Carolina,* —— F.Supp. ——, 43 L.W. 2441, 2442 (c. 2) (4-29-75), pointing out that *Mitchell* is not confined to statutes that afford a prejudgment remedy only to creditors holding a pre-existing interest in the property subjected to the writ.

A statute such as New York's undisputably contains most and, on analysis, all of the safeguards referred to in *Di-Chem. Di-Chem, id.* at 757, is not lacking in due process simply because of lack of a vendor's lien. The Court's opinion therein lays stress on *Mitchell's* (Louisiana's) writ of attachment sequestration being issuable only by a *judge* upon a sufficient affidavit.

It is apparent that the District Court placed an indefensible stress on the absence of a pre-existing possessory lien. With such a misconception, it ignored basic guidelines in determining due process. As said in *Mitchell, supra,* at 610 and left undisturbed by *Di-Chem*:

"The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary'. *Inland Empire Council* v. *Millis,* 325 U.S. 697, 710 (1945). Due process of law guarantees no particular form of procedure; it protects substantial rights. *NLRB* v. *Mackay Co.,* 304 U.S. 333, 351 (1938). The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois,* 405 U.S. 645, 650 (1972)".

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York
May 27, 1975

Respectfully submitted,

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Attorney for Defendants-Appellants Carey, Fine, Beisheim and pro se and also pursuant to New York Executive Law § 71

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Appendix A.

Text of sections of statute involved, New New Civil Practice Law and Rules.

§ 6201. Ground for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. *the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts;* or

5. *the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability;* or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any

other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. *there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.* (emphasis supplied on subsections invalidated from court judgment).

§ 6211. Order of attachment.

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, cost, and sheriff's fees and expenses.

Rule 6212. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers. On motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203* that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff.

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* So in the original. Probably should read "6201". (See 7B McKinney's, CPLR 6001 to 7700, p. 58, after text of R. 6212.)

(b) Undertaking. On a motion for an order of attachment the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the demand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in that action.

§ 6222. Discharge of attachment.

A defendant whose property or debt has been levied upon may move, upon notice to the plaintiff and the

sheriff, for an order discharging the attachment as to all or a part of the property or debt upon payment of the sheriff's fees and expenses. On such a motion, the defendant shall give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking. Making a motion or giving an undertaking under this section shall not of itself constitute an appearance in the action.

§ 6223. Vacating or modifying attachment.

Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

Appendix B—Regnell v. Page.

New York Law Journal, May 23, 1975, p. 14, c. 2
SUPREME COURT,
NEW YORK COUNTY.
SPEC. TERM, PART I.

Justice Fein

REGNELL v. PAGE—Motion by defendants to reargue that portion of their prior motion which sought vacatur of the order of attachment in this action, which was denied by order dated June 27, 1974, is deemed a motion for renewal and is granted. Upon reconsideration, the court adheres to its original determination sustaining the order of attachment.

Plaintiffs, as trustees of welfare and pension funds, sue to recover for the fraud of defendants in breach of collective bargaining and trust agreements, which required defendants to make payments or contributions to such funds to provide benefits to employees based upon the number of employee hours worked. Periodic reports were to be submitted detailing employee hours and the amount due. Payments were to be made to the funds pursuant to the reports, subject to a later audit. Plaintiffs allege the deliberate submission of false reports, causing the funds to become substantially underpaid, as disclosed by an audit which revealed the existence of a double set of bookkeeping records at least as to one of the companies.

The prior decision (New York Law Journal, July 9, 1974, p. 11, c. 7), declined to hold CPLR article 62, the attachment article, unconstitutional to the extent that it permits attachment without prior notice in an action to recover a money judgment on the grounds of fraud and deceit. In reliance upon Mitchell v. W. T. Grant Company (416 U. S. 600), it was held that the New York attachment

statute affords sufficient safeguards in that it permits an immediate test of the validity of the attachment by motion to vacate, constituting an adversary hearing where the facts are challenged or are in dispute.

The decision noted the important governmental and general public interest in honestly financing and properly maintaining employee welfare and pension trust funds, designed for the protection of employees and as a form of deferred compensation. An employer's failure to make employee welfare and pension contributions is made criminal (N. Y. Labor Law, sec. 198[c]), and personal liability is imposed on the ten largest shareholders of corporations which fail to make such contributions (N. Y. Business Corporation Law, sec. 630). There also exists a certain priority in insolvency proceedings for claims involving welfare and pension contributions (N. Y. Debtor and Creditor Law, sec. 22).

Defendants' motion for reargument is premised upon the authority of Sugar v. Curtis Circulation Company (383 F. Supp. 643), decided almost four months after the prior decision. That case held that the New York attachment statute, in particular, CPLR sec. 6201(4)(5) and (8), and CPLR sec. 6211, was unconstitutional to the extent that the challenged provisions collectively permit attachment merely upon plaintiff's ex parte allegation that defendant had defrauded him. The court stated, at 383 F. Supp. p. 650, "a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice."

With all due respect to the Sugar court, this court adheres to the prior determination that upon the facts and circumstances of this case, the New York attachment statute meets the requisites of procedural due process laid down in Mitchell. The decision of the Sugar court, albeit a three-judge federal court, is not controlling, although it is entitled to serious consideration (8 N. Y. Jur., Constitutional Law sec. 45; 147 A.L.R. 857; Zurich Gen.

A. & L. Ins. Co., Ltd. v. Lackawanna S. Co., 164 Misc. 498; aff'd 254 App. Div. 839, revd. 279 N. Y. 495, revd. 307 U. S. 265, reh. den. 307 U. S. 650 and 308 U. S. 631).

State court decisions subsequently rendered have upheld the constitutionality of the attachment statute, despite the Sugar decision. (Marshall, Bratter, Greene, Allison & Tucker v. Knight, N. Y. L. J., Dec. 20, 1974, p. 2, c. 3; Salerno v. Salerno, N.Y.L.J. Jan. 24, 1975, p. 18, c. 2; Boston Old Colony Ins. Co. v. Bianchi, N. Y. L. J., Feb. 26, 1975, p. 16, c. 1; New York Auction Co. v. Belt, N. Y. L. J., April 9, 1975, p. 17, c. 3; also see McLaughlin, New York Trial Practice, N. Y. L. J., Nov. 8, 1974, p. 1, cols. 1 and 2).

The federal court has stayed its decision in Sugar pending an appeal to the Supreme Court of the United States. Upon review, it appears that the principles stated in Mitchell do not warrant the extremely broad Sugar holding. The New York attachment statute, in its protective features, appears closer in form and substance to the statute upheld in Mitchell than to those declared invalid in (Fuentes v. Shevin, 407 U. S. 67). "[T]he narrow door of constitutionality left open in Mitchell", to adopt the phrase employed by the district court in Sugar, is sufficiently ajar to permit the New York statute to "squeeze through" as comfortably as did the Louisiana statute upheld in Mitchell.

Fuentes held unconstitutional Florida and Pennsylvania replevin statutes which permitted a secured installment seller to repossess goods which had been sold, without notice or hearing and without judicial order or supervision, upon a mere writ of replevin issued by the court clerk. There was no requirement of a convincing showing before seizure. All that was necessary was the bare asssertion on entitlement by the party seeking the writ. There was no opportunity for an immediate hearing until trial of the court action for repossession. The court held the seizure violative of due process standards, since it was carried

out without notice or opportunity for hearing and without judicial supervision.

Although, in sustaining the Louisiana sequestration statute, Mitchell departed from some of the broad pronouncements in Fuentes, the Mitchell court carefully noted that the Louisiana statute was substantially different from the Florida and Pennsylvania provisions invalidated in Fuentes: (1) the sequestration order could be issued only where the grounds relied upon clearly appeared from the affidavit or petition submitted in support of the writ; (2) judicial approval of the writ of attachment was required; (3) there was judicial control of the process from beginning to end; (4) the attaching creditor was obligated to post a bond; (5) the debtor (defendant) had the right to regain possession of the property or extinguish the attachment, by posting a bond; (6) the statute entitled defendant (debtor) to seek dissolution of the writ immediately to be granted unless the "creditor proves the grounds upon which the writ issued", and "failing which the court may order return of the property and assess damages in favor of the debtor, including attorneys fees."

The three judge court in Sugar, observing that the New York attachment statute is strikingly similar to the Louisiana sequestration statute in all respects but one, invalidate the New York statute on the ground that it does not guarantee defendant an opportunity for an immediate post-seizure hearing, at which the plaintiff must prove the grounds upon which the writ was issued. The court asserted that the sole basis for vacating an attachment under the CPLR is that the attachment is unnecessary to the security of the plaintiff. Such an interpretation, however, misconstrues the statute. A motion to vacate under CPLR 6223 on the ground that the attachment is unnecessary to the security of the plaintiff is but one of several available bases. Vacatur may be premised on the grounds, among others, that the attachment is unauthorized in the action, or that the ground for attachment relied upon

A. D. 2d 824). Where the complaint and affidavits fail to establish a prima facie cause of action, or where they clearly establish that 'the plaintiff must ultimately be defeated', the attachment must be vacated (American Reserve Ins. Co. v. China Ins. Co., 297 N. Y. 322, 325)."

And, in a case more clearly like ours, where the issue is one of fraud and disposition and secretion of assets, and no question of jurisdiction is involved, it has recently been ruled, in vacating an attachment, in Macmillan, Inc. v. Hafner, 42 A. D. 2d 533:

"At best, respondent presented but a scintilla of proof as to the requisite elements of the fraud cause of action alleged in the complaint. Such a perfunctory showing falls far short of the requirements to support the drastic remedy of attachment."

Even assuming that the prevailing case law imposes the burden on the defendant, such rule is neither implicit in nor directed by the New York statute and therefore should not affect its constitutionality. This is patent from this very case, where the issue is immaterial, since defendants do not challenge the facts as asserted.

As observed in the original decision, the papers in support of the attachment indicate a concession by defendants that the reports were false and that underpayments were made. A hearing under such circumstances would have no valid purpose.

In addition, it is significant that here, as in Mitchell, both parties assert a real interest to be protected, which, under the principles of Mitchell, requires an accommodation or balancing of interests in the application of due process requirements, rather than the inflexible approach taken by the three judge federal court in Sugar. As the Supreme Court observed in Mitchell:

"To summarize, the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the

is insufficient. There does exist an opportunity for an immediate post-sezure hearing. Defendant, at any time before application of the property or debt attached to the satisfaction of a judgment, may move, on notice, for an order vacating or modifying the order of attachment. As observed in this court's original decision, where the facts are challenged upon such a motion, an appropriate hearing may be ordered.

Thus viewed, the only difference between the Louisiana and New York statutes is that the New York statute, unlike Louisiana, does not state that upon a motion by defendant to dissolve the writ, the attachment is to be vacated unless plaintiff proves the grounds upon which the writ was issued. Sugar, citing New York authorities holding that defendant has the burden of proof upon such a motion concludes that this difference between New York and Louisiana is of constitutional significance. That due process is necessarily violated by imposing the burden of proof on a defendant is not nearly as clear as Sugar suggests (Leland v. Oregon, 343 U. S. 790; U. S. v. Ill. Central RR., 291 U. S. 457).

Moreover, the New York authorities are not so definitive as Sugar posits as to the burden of proof, except as to non-resident corporate defendants with only transitory assets in New York, as was the case in the most recent New York decisions cited in Sugar (Hydromar Corp. of Delaware v. Construction Aggregates Corp., 32 A. D. 2d 749; George A. Fuller Co. v. Vitro Corp. of America, 26 A. D. 2d 916).

Thus, in Stines v. Hertz Corp., 22 A. D. 2d 823, aff'd 16 N. Y. 2d 605, the court, in vacating an attachment, otherwise grounded, stated, at 22 A. D. 2d, p. 823:

"While the court is not required to decide the merits of a controversy on a motion to vacate an attachment 'the attachment papers must contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated (Krellberg v. Gregory, 10

property to start with, and this is done in pursuit of what we deem an acceptable arrangement pendente lite to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits" (Mitchell v. W. T. Grant Company, supra, 416 U. S. at p. 618).

In fixing and applying due process standards, there is a need for flexibility in balancing the interests of plaintiff and defendant, as recently stated in another context in Matter of Sanford v. Rockefeller (35 N. Y. 2d 557, at p. 563):

"The flexibility in approach to the balance to be struck in such cases can be seen in decisions of this court where we have measured the degree of essential due process to confirm to the petitioner's situation."

Here, plaintiff has an interest in the payments due the trust funds on behalf of defendants' employees, who also have an interest to be protected. The defendants oviously have an interest in the property attached. Moreover, as noted, there is manifestly an important governmental and general public interest in honestly financing and properly maintaining employee welfare and pension trust funds. Considering the New York procedure as a whole, it appears that, in accordance with the principles set forth in Mitchell in sustaining the Louisiana Statute, "the State has reached a constitutional accommodation of the respective interests" of all parties (Mitchell v. W. T. Grant Company, 416 U. S. at p. 610).

Of further significance is the fact that, although the attachment was based upon allegations of fraudulent conduct, there is also some evidence that defendants were about to leave the jurisdiction and that some of defendants' property had already been sold and converted into cash. The properties attached are apparently of businesses which are no longer operating and the attachment actually amounts to no more than a lien against defendants' real estate and possible accounts receivable. Nor has

the defendants' use and possession of the real property been interfered with. The only practical effect of the attachment is to prevent disposal of conveyance to a third party. As observed initially, these are not the kind of important interests required by the Supreme Court to be held immune from attachment prior to a hearing on notice.

Defendants are not aided by recent post-Sugar changes in the rules of the Civil Court of the City of New York (Notice, Thompson, J., N.Y.L.J., 10/3/74, p. 1, cols. 6 and 7) directing that all orders of attachment provide that plaintiff, within three days after levy, shall move on notice to the defendant, the garnishee and the sheriff, for leave to prove the grounds upon which the order of attachment was issued. The burden of proof on such a motion is on the plaintiff, and the attachment will be deemed vacated if such a motion is not made.

In the original decision on the motion, almost four months prior to the federal opinion in Sugar, it was suggested.

"Although CPLR article 62 does not now so provide, it may very well be appropriate, in the interests of due process, for the court to follow the practice used where an interim stay is granted in an order to show cause. The attachment order could incorporate a provision staying transfer of the property attached until an almsot forthwith return day fixed in the order, thus affording an immediate opportunity to be heard." (N.Y.L.J., 7-9-74, p. 11, c. 8).

Whatever the wisdom of such provisions which upon plaintiff both the burden of applying to the court for relief, and the additional burden of proof therein, the central issue here is the constitutional significance and effect of the failure of our Legislature to incorporate such a provision in the statutory scheme. It must be held that the absence of such provision is not of constitutional import under the facts and circumstances of this case. Plaintiffs have affirmatively estalished a valid basis, without contra-

diction by the defendants, to uphold the ex parte issuance of the order of attachment. The possession of the property by defendants is not affected. As the facts asserted and upon which the attachment order wa issued are not in dispute, there is no need for a formal hearing.

Serve a copy of this order with notice of entry without undue delay.

Supreme Court, U. S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Nature of Appeal

This is an appeal from the judgment of a three judge district court in the Southern District of New York which unanimously held the challenged provisions of the New

York Attachment Statute, New York Civil Practice Law and Rules, §§ 6201 (4), (5) and (8); § 6211, unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted *ex parte* and without notice. Probable jurisdiction was noted by this Court on April 14, 1975.

Question Presented

The substantive question on this appeal involves the constitutional validity of the New York statutory scheme which permits the pre-judgment seizure of property and debts without notice and hearing and without granting to the defendant a meaningful opportunity to vacate an attachment granted *ex parte* and without prior notice.

Statement of the Case

A. The New York Attachment Statute [Article 62 of the New York Civil Practice Law and Rules]

Article 62 of the Civil Practice Law and Rules of the State of New York contains the New York Attachment Statute, §§ 6201 through 6226 (J.S. 37a-49a).[1]

§ 6201 *inter alia* provides that "[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants" in eight different type situations. Subparagraphs 1, 2, 3 and 7 relate to securing jurisdiction over the defendant and subparagraph 6 relates to the wrongful possession of governmental property, and not having been considered by the

[1] Numbers in parentheses refer to the Appendix (a); Appendix to Jurisdictional Statement (J.S. a) or Plaintiffs' Appendix in the District Court (Pl. App.), which is part of the record on this appeal.

three-judge court, are not involved in this appeal. The other three subparagraphs 4, 5 and 8 relate to various types of alleged fraud on the part of the defendant and are part of the specific subject matter of this appeal (J.S. 38a-39a).

§ 6211 which is also the specific subject matter of this appeal, sets forth the required contents of the order of attachment and, provides *inter alia* "[a]n order of attachment may be granted *without notice* before or after service of summons and at any time prior to judgment" [Emphasis supplied] (J.S. 40a).

§ 6212 (b) requires that the plaintiff "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (J.S. 41a), whereas pursuant to § 6222 the defendant in order to discharge the attachment and release its property must "give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking" (J.S. 48a).

Finally, § 6223 permits the defendant to "move, on notice • • • for an order vacating or modifying the order of attachment [and if] the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment" (J.S. 48a).

B. The Contract Between Wrestling Revue and National Sports

On November 28, 1972, as of the 31st day of October 1972, Wrestling Revue and National Sports Publishing Corporation, entered into a written contract providing for the sale of certain sports publications owned by Wrestling Revue to National Sports for a purchase price of "a minimum of $50,000 and a maximum of $100,000" payable

in specified installments (Pl. App. 46-61). The first installment of $25,000 was paid at the time of the signing of the contract on November 28, 1972. The following two fixed installments of $12,500 each were due and payable on February 28, 1973, and May 28, 1973, respectively. In addition thereto, the contract further provided for additional payments for ten years, based on the after tax profits of National Sports.

National Sports failed to make the installment payment of $12,500 due and payable on February 28, 1973 (Pl. App. 146) and Wrestling Revue instituted an action as plaintiff and against National Sports, as defendant, in the Supreme Court of the State of New York, in and for the County of Westchester, as a result of National Sports' breach thereof, by failing to make such installment payment.

As of April 16, 1973, National Sports had failed to make the $12,500 payment to Wrestling Revue due on February 28, 1973 and on such date was indebted to Wrestling Revue in the amount of $12,500. On May 28, 1973, National Sports was further required to make an additional installment payment to Wrestling Revue of an additional $12,500 which it refused and failed to make.

C. The Negotiations Between Curtis, National Sports and Wrestling Revue and Their Attorneys

Between February 23, 1973 and April 13, 1973, extensive correspondence was had betweeen Curtis and its attorneys and National Sports, its parent company, Whitney Communications Corporation and its attorneys, with respect to certain monies that Curtis allegedly claimed were due to it from a company known as Champion Sports Publishing, Inc. for distributing some of the publications sold to National Sports by Wrestling Revue (Pl. App. 141-144).

During such entire period of time the attorneys for both Curtis and National Sports were in constant communica-

tion with the law firm of Levy and Ledes, the attorneys for both Wrestling Revue and Champion Sports with respect to the alleged claim of Curtis for such monies due to it from Champion Sports.[2]

For many months prior to April 13, 1973, Curtis and its attorneys knew that Levy and Ledes were the attorneys for Wrestling Revue, Champion Sports and Sugar, their Chief Executive Officer, and knew that Messrs. Levy and Ledes were available to accept the service of process or appear in court proceedings or at court hearings on behalf of all or some of such clients, as the situation would require.

D. The Order of Attachment

On April 13, 1973, Curtis, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, applied to the Supreme Court of the State of New York, County of New York, for an order of attachment pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, directing the Sheriff to levy "upon such property in which Sugar, Wrestling Revue and Champion Sports have an interest and upon such debts owing to them as will satisfy Curtis' demand of $28,588.08 together with probable interests costs and Sheriff's fees and expenses." (39a).

In support of such application, made in the form of a motion (39a-58a), without notice to Sugar, Wrestling Revue or Champion Sports, in an action not then commenced, to be entitled "Supreme Court of the State of New

---

[2] Thus the statement at page 5 of the Curtis brief that "with the facts uncovered" Curtis confronted appellees' attorneys and "they would give no satisfactory explanation" is pure fantasy. Every *fact* was voluntarily furnished to Curtis by National Sports or Sugar, and appellees' attorney, Gabriel I. Levy was in constant communication with Curtis' attorneys for months before with respect to the matter. The fraud was created in the fertile imagination of Curtis at precisely the moment that Wrestling Revue was to receive its payment from National Sports.

York, County of New York, Curtis Circulation Company, Plaintiff, against Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, Defendants", Curtis contended *inter alia* "that a cause of action for a money judgment exists in favor of Curtis and against Sugar, Wrestling Revue and Champion Sports, jointly and severally, in the sum of $28,588.08 as well as for other sums, together with interest and costs thereon and that Curtis is entitled to recover said sum of $28,588.08 over and above all counterclaims known to it" (39a-40a).

Curtis further contended *inter alia* that it was entitled to an order of attachment against the property of Sugar, Wrestling Revue and Champion Sports on the grounds that:

> (a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors" [CPLR § 6201(4)];
>
> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" [CPLR § 6201(5)]; and
>
> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" [CPLR § 6201(8)] (40a).[3]

[3] Thus Curtis sought the Order of Attachment against Champion Sports under subdivisions (4), (5) and (8); against Sugar under subdivisions (5) and (8); and against Wrestling Revue *only* under subdivision (8). Thus, Sugar's wages of $124.17 were seized under subdivisions (5) and (8) and Wrestling Revue's monies amounting to $24,200 were seized solely under subdivision (8), since the only claim against Wrestling Revue for which an attachment is authorized under § 6201 is the nebulous claim against it for fraud [52a-54a]. This distinction is of great significance in view of the recent decisions of this Court in *Mitchell* v. *W.T. Grant Company*, 1974, 416 U.S. 600 and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751.

In further support thereof Curtis submitted to the Court an undertaking of Continental Casualty "in the sum of $10,000, of which amount the sum of $8,570 thereof is conditioned that Curtis will pay to Champion Sports, Wrestling Revue and Sugar all legal costs and damages which may be sustained by reason of the attachment if Champion Sports, Wrestling Revue and Sugar recover judgment or it is finally decided that Curtis was not entitled to an attachment of the property of Sugar, Wrestling Revue and Champion Sports and the balance thereof [of $1,430] conditioned that Curtis will pay the Sheriff all of his allowable fees" (Pl. App. 172).[4]

On April 13, 1973, prior to the commencement of any action, and without notice to Sugar, Wrestling Revue and Champion Sports, or its attorneys, or an opportunity to be heard with respect to the validity of Curtis' underlying claim and Curtis' right to an order of attachment, Mr. Justice Fine pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York signed an order of attachment wherein he made findings of fact adverse to the interests of Sugar, Wrestling Revue and Champion Sports and "[o]rdered the Sheriff of the City of New York or the Sheriff of any county in the State of New York to levy within his jurisdiction at any time before final judgment upon such property in which Champion Sports, Wrestling Revue and Sugar have an interest and upon such debts owing to them as will satisfy Curtis' de-

[4] Thus while the order of attachment was in the amount of $28,588.08, Curtis was only required to give an undertaking in the amount of $10,000 of which amount only $8,750 was to indemnify appellees for damages, the balance thereof to indemnify the Sheriff for his fees. Since the amount actually attached by the Sheriff amounted to $24,324.17, appellees in order to dissolve the attachment under § 6222 would have had to give an undertaking in almost three times the amount of the undertaking given by Curtis to secure the attachment.

mand of $28,588.08, together with probable interest, costs and Sheriff's fees and expenses and that he proceed thereon in the manner required by law" (39a-41a).

E. The Sheriff's Levy and the Payment of the Appellees' Money to the Sheriff

On April 16, 1973, prior to the commencement of any action and without notice to Sugar, Wrestling Revue and Champion Sports or their attorneys, the Sheriff by one of his deputies caused the order of attachment to be served upon National Sports and levied thereunder upon all monies then due pursuant to § 6214 of the Civil Practice Law and Rules and thereafter coming due to Sugar and Wrestling Revue from National Sports up to the amount of $28,588.08.

On April 26, 1973, National Sports served a Garnishee Statement (78a) pursuant to § 6219 of the Civil Practice Law and Rules upon the Sheriff with respect to monies then owed by it to Wrestling Revue pursuant to the agreement of November 28, 1972 and paid to the Sheriff "$9,323.54, in discharge to the extent of such payment of its obligation to Wrestling Revue with respect to the February 28, 1973 purchase price installment" (79a), which monies were the property of, and belonged to Wrestling Revue, and to which it was immediately entitled to the beneficial use thereof.

On May 2, 1973, National Sports made a further payment pursuant to the order of attachment and levy to the Sheriff of $200 which monies were the property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof (Pl. App. 148). On May 16, 1973, National Sports made another further payment pursuant to the order of attachment and levy to the Sheriff of $124.17, which monies were wages then due to Sugar and

to which he was immediately entitled to the beneficial use thereof.[5]

F. The Second Levy

As of May 24, 1973, Curtis admitted in the state court action then pending between it and Sugar, Wrestling Revue and Champion Sports, that the maximum amount that was then due to it from Champion Sports was $17,857.49 (Pl. App. 152-154). Curtis never took the necessary action to reduce the amount of the order of attachment to reflect the reduced amount it claimed as of May 24, 1973.

On May 28, 1973, National Sports pursuant to the agreement of November 28, 1973, was required to make a further installment payment to Wrestling Revue of $12,500 (Pl. App. 47) which it refused and failed to make as a result of the order of attachment and Sheriff's levy served upon it on April 16, 1973.

On September 24, 1973, the Sheriff re-served the order of attachment upon National Sports and made a second levy again in the amount of $28,588.08, notwithstanding that the maximum amount then claimed by Curtis was only $17,857.49 (Pl. App. 154) and of which the Sheriff had already taken possesion of $9,647.71.

Pursuant to § 6214(b) of the Civil Practice Law and Rules of the State of New York, a levy made under an order of attachment expires ninety days after service thereof and as a result of the refusal and failure of Na-

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[5] CPLR § 5205(e) exempts 90% of income from attachment and therefore only 10% of the wages then due to Sugar amounting to $124.17 was withheld by National Sports and paid by it to the Sheriff pursuant to the Order of Attachment and levy made thereunder. This prejudgment seizure of Sugar's wages without notice and hearing is precisely similar to the garnishment of wages under Wisconsin law, which was declared unconstitutional by this Court in *Snaidach* v. *Family Finance Corporation of Bayview*, 1969, 395 U.S. 337.

tional Sports to pay over to the Sheriff the $12,500 installment due to Wrestling Revue, on May 28, 1973, such second levy made on September 24, 1973, would have expired on December 24, 1973.

On December 4, 1973, Curtis, without notice to the attorneys for Sugar, Wrestling Revue and Champion Sports, who had appeared in such action on April 18, 1973, and interposed their answer to Curtis' complaint on April 27, 1973, applied to the Supreme Court of the State of New York, County of Westchester, where the action was then pending, for an order extending the second levy until March 24, 1974 (Pl. App. 134-138).

On December 7, 1973, and without notice to Sugar, Wrestling Revue and Champion Sports, or their attorneys, or affording them a prior hearing or an opportunity to be heard with respect to Curtis' application for a ninety day extension of such levy, Mr. Justice Beisheim, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, signed an order granting such motion of Curtis and extended such levy to March 24, 1974, with respect to "[a]ll property in the possession or control of National Sports in which Champion Sports, Wrestling Revue and Sugar have any title or interest" (Pl. App. 134-135).

On April 16, 1974, Curtis secured a further order from the Supreme Court of the State of New York, County of Westchester, pursuant to Article 62 of the Civil Practice Law and Rules of the State of New York, extending the levy under the Order of Attachment for an additional year, until March 24, 1975, with respect to "[a]ll property in the possession or control of National Sports Publishing Corporation in which any or all of the defendants, Champion Sports Publications, Inc., Wrestling Revue, Inc. and Bert Randolph Sugar, have any title or interest" (Pl. App. 139-140).

G. The Settlement of the Dispute Between National Sports and Wrestling Revue

On March 8, 1974, Wrestling Revue and National Sports entered into an agreement (Pl. App. 155-165) settling all disputes between them, which *inter alia* provided for the payment of $15,676.46 by National Sports to Wrestling Revue in stated installments on April 30, 1974, May 31, 1974 and June 30, 1974 (Pl. App. 157-158) and further provided that if on the due date of any payment provided for therein, such payment is subject to the levy under the Order of Attachment, or any renewal or extension thereof, National Sports shall make such payment to the Sheriff of the City of New York, instead of Wrestling Revue.

H. The Further Payments of Wrestling Revue's Money by National Sports to the Sheriff

On April 30, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $4,865 (Pl. App. 166) which monies were the sole property of and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

On June 5, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $5,000 (Pl. App. 167) which monies were the sole property of, and belonged to Wrestling Revue and to which it was immediately entitled to the beneficial use thereof.

On July 1, 1974, National Sports made a further payment pursuant to the Order of Attachment and levy to the Sheriff of $4,811.46, which monies were the sole property of, and belonged to Wrestling Revue, and to which it was immediately entitled to the beneficial use thereof.

I. The Failure of the Sheriff to Respond to Plaintiffs' Demands

On December 21, 1973, prior to the commencement of this action and again on June 20, 1974, appellees' attorneys wrote to the Sheriff demanding that he forthwith alvise "as to the amounts of monies presently being held by [him] pursuant to such Order of Attachment" (99a-102a). No response has ever been received from the Sheriff with respect to such demands, notwithstanding the fact that the monies being held by him is the sole and exclusive property of the appellees.

This certainly is not the type of "judicial supervision and management" approved by this Court in *Mitchell* v. *W. T. Grant Company,* 416 U.S. at 618. The appellees, as indicated by the actions of the Sheriff herein, or better characterized by his inaction, are "at the unsupervised mercy of the creditor [Curtis] and court functionaries [the Sheriff]" explicitly rejected by this Court in *Mitchell,* since there is nothing in the New York Attachment Statute to protect the appellees, at least to the extent of receiving an accounting from the public official that holds their monies, and there are no "measures adopted by the State [of New York] to minimize the risk that the ex-parte procedure will lead to a wrongful taking." 416 U.S. at 616-617.[6]

The Opinion Below

The three-judge District Court whose decision is reported at 383 F. Supp. 643 (J.S. 1a-14a) unanimously held the "challenged provisions [of the New York Attachment Statute, CPLR §§ 6201 (4) (5) and (8); § 6211] unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment

[6] The Sheriff of the City of New York was a party to the District Court action, but failed to appear or answer therein and is in default.

granted ex parte and without prior notice" (J.S. 12a; 383 F. Supp. at 650).

The District Court in a unanimous opinion by Judge Lasker, after reviewing the recent decisions of this Court in *Snaidach* v. *Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Mitchell* v. *W. T. Grant Company,* 416 U.S. 600 (1974) which dealt with similar statutes, concluded that the New York statute unlike the Louisiana statute upheld in *Mitchell* "do[es] not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and it] f[o]und that the opportunity for such a hearing was critical to the holding in *Mitchell,* and its absence renders New York's statute fatally defective" (J.S. 7a-8a; 383 F. Supp. at 648).

In reaching this conclusion the District Court noted (J.S. 8a-10a; 383 F. Supp. at 648-649):

> "There are several reasons why § 6223—the sole mechanism available to a defendant who seeks to vacate the attachment—does not meet the standards of the *Mitchell*-Louisiana statute which provided in straightforward language (Article 3506, Louisiana Code of Civil Procedure): 'The defendant by contradictory motion may obtain dissolution of a writ of attachment or of sequestration *unless the plaintiff proves the grounds upon which the writ was* issued.' [Emphasis in decision of the District Court]
>
> "By its terms, that is, the Louisiana law required that the attachment be vacated unless the grounds upon which it was issued are proven, and imposed the burden of such proof on the creditor.
>
> "The New York Statute affords neither protection. The sole basis for vacating the attachment under the CPLR is *not* that the grounds upon which it has been issued are unproven, but rather that the attachment

'is unnecessary to the security of the plaintiff'; and the burden of proof is not, as in *Mitchell,* on the plaintiff, but on the defendant.

"That this is not too narrow or literal a reading of the language of 6223, is resoundingly confirmed by numerous holdings of the New York courts. Without exception they have ruled—for at least fifty years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based 'clearly indicate that the plaintiffs must ultimately fail.' • • •. The burden is on the defendant to establish that the plaintiff *cannot* succeed, • • •; and to demonstrate that the plaintiff has not established a cause of action, which permits attachment, • • •; and to establish that the attachment is unnecessary for the security of the plaintiff, [citing New York cases].

"Indeed under the decisions of New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223—a construction which we believe is proper in the light of the strictly limited wording of the law." [citing New York cases].

While the District Court found these considerations to be dispositive, it found "other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone since

> "In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion (J.S. 10a; 383 F. Supp. at 649-650 [and], [t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex-parte determination where, as here, the critical allegations of fraud, however detailed, are based on information and belief" (J.S. 11a; 383 F. Supp. at 649-50).

Summary of Argument

Notwithstanding all the rhetoric to the contrary, the New York Attachment Statute makes no provision for a defendant to avail himself of a right to a hearing at a meaningful time and in a meaningful manner. The right to such a hearing, at most, is discretionary with the court. The vacatur provision affords a right within the limits of the statute and under the decisions of New York courts the merits of the action are irrelevant on a motion to vacate the attachment under CPLR § 6223. The prescribed standard of New York's Court of Appeals is a jurisdictional one requiring the burden to be borne by the defendant to show that "the plaintiff must ultimately fail" *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 377 (1923), or that the plaintiff has not established a cause of action justifying the drastic remedy of attachment, *American Reserve Inc. Co.* v. *China Ins. Co.,* 297 N.Y. 322, 325 (1948).

It is futile to argue that the lower court in its opinion failed to interpret the New York law and cases correctly. It is axiomatic that jurisdictional challenges to the papers on which an attachment writ is issued are always available. To state that the court below misinterpreted the New York law for failure to sweep into its opinion the minute debris of jurisdictional reasons for vacatur constitutes a legal *non sequitur.*

In the rash of recent cases of New York's lower courts, which opinions have proliferated in the New York Law Journal, the reasons for vacatur being granted or denied were jurisdictional in nature. Jurisdictional issues, failure to state a cause of action, the plaintiff cannot prevail, or intent may not be presumed are but a few of the reasons set forth by the courts. Appellants cite the court dicta in these opinions to support their position. In this plethora of opinion not one single word is set forth of substance to the effect that a defendant has an immediate hearing as a

matter of right, in which the plaintiff must assume the burden of proving his case.

The appellants' contention is that it is the compelling interest of the state to discourage fraud. Respondents' rejoinder is that it is more compelling that a victim of a fraud allegation be afforded a due process right to defend as envisioned constitutionally.

Curtis' allegation of fraud is illusory, fictional and peculiarly suited to slide into the enabling recital of the New York Attachment Statute. The statutory sequestration procedures of Louisiana are so narrowly drawn that they are limited to a creditor having a specific right in the property to be seized. The New York procedure is amorphous, fluid, broad and unlimited. In the herein case we have Curtis, without a possessory prior right, nor a color of a claim of interest, attaching monies due Sugar and Wrestling Revue in April of 1973. Not having ever advanced any fungible currency to Sugar personally or Wrestling Revue, Curtis' writ of attachment deprives both of monies which arises from a contractual claim against Champion. The recital of fraud produced the necessary connection under the New York attachment provisions. The availability of the allegation of fraud in any contract action puts a premium on rascality for it affords a convenient means of grabbing the jugular.

The statutory scheme is so broad and rambling that the seizure of property without due process may be accomplished, as it was here, by joining parties on the allegations of a hearsay affidavit in which a plaintiff-creditor may weave a fictional account of errant misdeeds and thereby deprive the defendants of the very funds to feed the sinews with which they must defend themselves. The pragmatic reality is that defendants are rendered incapable of using their funds for legal assistance to defend themselves, thus compounding the deprivation of respondents Sugar and Wrestling Revue's Fourteenth Amendment rights to due process.

ARGUMENT FOR APPELLEES

POINT I

The New York Attachment Statute is not constitutionally permissible in that it puts defendants' property totally beyond use without notice or opportunity for an early hearing on the bare allegation of a *prima facie* case by a plaintiff and places the burden of proof on the defendant.

A. Historical Precedents

The constitutionality of summary procedures authorizing the prejudgment seizure of personal property was seldom challenged prior to the decision of this Court in *Snaidach* v. *Family Finance Corporation of Bayview,* 1969, 395 U.S. 337. In the few cases wherein such procedures were challenged they were universally upheld on the rationale that there would have to be an adjudication of the rights of the parties before the property could finally be subjected to the plaintiffs' claim, and that therefore an attachment or garnishment was not a deprivation of property without due process of law, within the meaning of constitutional provisions (See 6 Am. Jurs. 2d Attachment and Garnishment, § 5; 18 A.L.R. Fed. 223, 230, Validity of Prejudgment Seizure).

In three cases long prior to *Snaidach,* this Court had permitted the attachment of property without notice and a prior hearing. In *Ownbey* v. *Morgan,* 1921, 256 U.S. 94, the court upheld the constitutionality of Delaware's foreign attachment law, even though that law provided that the defendant could not even appear and defend until he had given security in the amount of the value of the property attached. In *Coffin Brothers & Co.* v. *Bennett,* 1928, 277 U.S. 29, the Court sustained the constitutionality of a Georgia statute that authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been

levied. In *McInnes* v. *McKay,* 1929, 279 U.S. 820 the Court in a per curiam decision affirmed a holding of the Supreme Court of Maine (1928, 127 Me. 110, 141 A. 699), that rejected a contention that a Maine statute which permitted attachment without affidavit or bond in advance of judgment deprived the defendant-debtor of due process of law.[7]

However, Supreme Court cases prior to *Snaidach* had established that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend" (*Windsor* v. *McVeigh,* 1864, 93 U.S. 274, 277), and that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they are to enjoy that right they must be notified" (*Baldwin* v. *Hale,* 1864, 68 U.S. 223). The theme that "due process of law signifies a right to be heard in one's defense" (*Hovey* v. *Elliot,* 1897, 167 U.S. 409, 417) has continually recurred in the years since *Baldwin, Windsor* and *Hovey* (*Boddie* v. *Connecticut,* 1971, 401 U.S. 371, 377-378 and cases cited at footnote 3) and "[t]he fundamental requisite of due process of law is the opportunity to be heard" (*Grannis* v. *Ordean,* 1914, 234 U.S. 385) "which must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo,* 1965, 380 U.S. 545, 552).

B. *Snaidach* v. *Family Finance Corporation of Bayview,* 1969, 395 U.S. 337

It was against this array of formidable authority that Mrs. Snaidach launched her constitutional attack on the

[7] This statute was recently declared unconsittutional by a three-judge court in *Gunter* v. *Merchants Warren National Bank,* D. Maine 1973, 360 F.Supp. 1085, as was the Massachusetts attachment statute upon which the Maine statute was based (*Schneider* v. *Margossian,* D. Mass. 1972, 349 F.Supp. 741, three-judge court).

Wisconsin garnishment statute which permitted the creditor, without notice or hearing, to require the employer to withhold from the defendant part of her wages, pending a trial on the merits in the main suit. Mrs. Snaidach contended that the Wisconsin statute violated due process because it enabled the creditor to take property before a hearing on the validity or probable validity of the underlying obligation. This Court agreed and declared the Wisconsin statute unconstitutional "that absent notice and a prior hearing • • • this prejudgment garnishment procedure violates the fundamental principles of due process" (395 U.S. at 342).

In a concurring opinion Mr. Justice Harlan pointed out "that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use" (395 U.S. at 343).

The seed of *Snaidach* reached far and wide and resulted in the decimation of many state attachment statutes,[8] garnishment statutes[9] and other provisional remedies, long

[8] Alaska: *Etheridge* v. *Bradley,* Alaska 1972, 502 P.2d 146; California: *Randone* v. *Appellate Dept. of Sup. Ct. of Sacramento,* 1971, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709; *Damazo* v. *MacIntyre,* 1972, 26 Cal. App. 3d 18, 102 Cal. Rptr. 609; Delaware: *Mills* v. *Bartlett,* Del. Super. 1970, 265 A.2d 39; Washington: *Lucas* v. *Stapp,* 1972, 497 P.2d 250, 6 Wash. App. 971; *Seattle Credit Bureau* v. *Hibbitt,* 1972, 449 P.2d 92, 7 Wash. App. 219. The cases which followed *Fuentes* in declaring state attachment statutes unconstitutional are legion and just too numerous to mention.

[9] Alabama: *McMeans* v. *Schwartz,* S.D. Ala. 1971, 330 F. Supp. 1397 [wages], Arizona: *Arnold* v. *Knettle,* 1969, 10 Ariz. App. 509, 460 P.2d 45 [wages]; *Western Coach Corp.* v. *Shreve,* D. Ariz. 1972, 344 F. Supp. 1136 [bank account]; California: *McCallop* v. *Carberry,* 1970, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666; *Cline* v. *Credit Bureau of Santa Clara Valley,* 1970, 1

(footnote continued on following page)

before the historic decision of this Court in *Fuentes* v. *Shevin,* 1972, 407 U.S. 67, including the New York replevin statute (*Laprease* v. *Raymours Furniture Company,* N.D. N.Y. 1970, 315 F.Supp. 716, three-judge court).

The subsequent amendment and application of the New York Replevin Statute (CPLR, Article 71) is most helpful in determining as to what constitutes "due process of law". The replevin statute declared unconstitutional in *Laprease* was strikingly similar to the Florida and Pennsylvania statutes subsequently struck down in *Fuentes.* It was amended in 1971 to require a court order "upon such terms as may be required to conform to the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States" (CPLR § 7102(d)(1)). In applying such provision the New York courts have invariably required prior notice and hearing before granting an order to seize a chattel since the statute means and due process requires "notice to the [alleged debtor] and an opportunity to be heard," before he may be deprived of his property (*Cedar Rapids Engineering Co.* v. *Haenelt,* App. Div. 3rd Dept. 1972, 39 A.D. 2d 275, 333 N.Y.S.2d 953, 956; see also *Finkenberg Furniture Corp.* v. *Vasquez,* Civil Ct., N.Y. County 1971, 67 Misc. 2d 154, 324 N.Y.S.2d 840; *Kosches* v. *Nichols,* Civil Ct., N.Y. County, 1971, 68 Misc. 2d 795, 327 N.Y.S.2d 968, both decided prior to *Fuentes*).

(*footnote continued from preceding page*)

Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669, Georgia; *Reeves* v. *Motor Contract Company of Georgia,* N.D. Ga. 1971, 324 F.Supp. 1011 [wages]; *Aaron* v. *Clark,* N.D. Ga. 1972, 342 F.Supp. 898 ["specialized" property]; Illinois: *Scott* v. *Danaker,* N.D. Ill. 1972, 343 F. Supp. 1272 [non-wage assets]; Minnesota: *Jones Press, Inc.* v. *Motor Travel Services, Inc.,* 1970, 286 Minn. 205, 176 N.W.2d 87; New Mexico: *Galindo* v. *Western States Collection Co.,* 1970, 82 N.M. 14, 477 P.2d 325; Wisconsin: *Larson* v. *Fetherston,* 1969, 44 Wis.2d 712, 172, N.W. 2d 20 [accounts receivables]. Again, the cases which followed *Fuentes* are legion and just too numerous to mention.

C. *Fuentes* v. *Shevin,* 1972, 407 U. S. 67

On June 12, 1972, this Court removed any doubt as to the far reaching effect of *Snaidach* with respect to the validity of prejudgment seizures without notice or hearing when it decided *Fuentes* v. *Shevin,* 407 U.S. 67.

Fuentes involved the validity of the Pennsylvania and Florida replevin statutes where purchasers of household goods challenged their constitutionality. These laws permitted a private party, without a prior hearing or notice to the other party, to obtain a writ of replevin upon an *ex parte* application to the clerk of the court and upon posting a bond. Upon delivery of the writ of replevin to the Sheriff he was required by law to seize the property. Thereafter the defendant had the right to reclaim possession by posting his own bond (407 U.S. at 73-78). Sellers holding purchase money security interests utilized this remedy when their buyers allegedly defaulted in making payments. The buyers contended that the fact that they had missed installment payments did not prove that they were in default, because their sellers had breached their warranties respecting the goods and were thus subject to an offset in the price to the extent of those breaches.

The buyers alleged that the sellers' use of replevin under this circumstance amounted to a taking of their property before they had an opportunity to be heard on the validity of the claim under which the taking was made, in violation of the due process clause of the Constitution. Three-judge district courts in both cases (*Fuentes* v. *Faircloth,* S.D. Fla. 1970, 317 F.Supp. 954; *Epps* v. *Cortese,* E.D. Pa. 1971, 326 F.Supp 127) upheld the constitutionality of the challenged replevin provisions but this Court, reversed these decisions and held that the Florida and Pennsylvania replevin laws violated the due process clause since they had the effect of depriving the defendants of their property, prior to an opportunity to be heard on the validity, or at least the probable validity of the underlying claim.

Mr. Justice Stewart speaking for the Court pointed out at 407 U.S. at 84, 85

> "[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"

citing *Snaidach and Bell* v. *Burson,* 1971, 402 U.S. 535.

Fuentes rejected the contention that *Snaidach* only restrained creditors in their use of pre-judgment remedies where they were employed to take wages or other necessities of life, 407 U.S. at 88, 89.

> "This reading of Snaidach • • • reflects the premise that [this case] marked a radical departure from established principles of procedural due process. [I]t did not. [It was] in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect • • • . While Snaidach . . . emphasized the special importance of wages • • • [it] did not convert that emphasis into a new and more limited constitutional doctrine.
>
> "Nor did [it] carve out a rule of 'necessity' for the sort of nonfinal deprivation of property that [it] involved • • •. The Fourteenth Amendment speaks of property generally."

In this context Mr. Justice Stewart referred to *Bell* v. *Burson, supra,* which held 402 U.S. at 539 that "it is an 'important interest' [that is] entitled to the protection of procedural due process of law" (407 U.S. at 89). Certainly in addition to Sugar's wages, protected by *Snaidach,*[10] the $24,200 belonging to Wrestling Revue seized by the Sheriff without prior notice or hearing is such an

[10] See footnote 5, *ante* at p. 9.

"'important interest' entitled to the protection of procedural due process of law" (see also *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 1975, —— U.S. —— 42 (Ed. 2d 751, 757).

Fuentes recognized that prejudgment remedies may be used under some circumstances for the purpose of acquiring jurisdiction over the defendant or his property to implement what is "clearly a most basic and important public interest" (*Ownbey* v. *Morgan, supra*) and "to protect the public against [some] sort of immediate harm", where it is "necessary to secure an important governmental or public interest [and] there has been a special need for very prompt action" (407 U.S. at 91).

Mr. Justice Stewart carved out one final exception which would permit the use of prejudgment seizures without notice or hearing when he stated, 407 U.S. at 93 that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." Presumably in such cases summary seizures would be permitted. But he further pointed out that the Pennsylvania and Florida replevin statutes "are not narrowly drawn to meet any such unusual condition." *Snaidach* (395 U.S. at 339).

Such a case was soon to reach the Supreme Court in *Mitchell* v. *W. T. Grant Company,* 1974, 416 U.S. 600.

D. *Mitchell* v. *W. T. Grant Company,* 1974, 416 U.S. 600, Its Breadth and Scope

On May 13, 1974, during the pendency of this case, this Court upheld the constitutionality of the Louisiana sequestration statute, which under very limited circumstances permitted a prejudgment seizure of property without notice or hearing "[w]hen one claims the ownership or right to possession of property, or a mortgage lien or privilege thereon • • • if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues

therefrom or remove the property from the parish, during the pendency of the action" (Louisiana Code of Civil Procedure, Art. 3571, 416 U.S. at 605, 623).

At first glance it might appear that *Mitchell* overruled *Fuentes,* however, a careful reading of *Mitchell* clearly indicates that its holding stands for nothing more than the exception carved out by the Court in *Fuentes* where the "creditor [was able to] make a showing of immediate danger that a debtor will destroy or conceal disputed goods [and the Louisiana sequestration statute was] narrowly drawn to meet * * * such unusual condition" (*Fuentes,* 407 U.S. at 93). This fact was recognized by Mr. Justice White when he pointed out 416 U.S. at 615 that the Court was "convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that before [it] and that it [did] not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in [Mitchell]."

At best, it can be said that the holding in *Mitchell* stands for the proposition that the constitutional validity or invalidity of each prejudgment seizure statute is to be determined as to whether the "statutory procedure effects a constitutional accommodation of the conflicting interest of the parties" in the specific property which is the subject of the seizure (416 U.S. at 607). It is specifically inapplicable "where the property sequestered by the court is exclusively the property of the debtor [which] may [not] be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized" (416 U.S. at 604) and the holding in *Mitchell* is specifically "limited to the constitutionality of the Louisiana sequestration procedure" (416 U.S. at 618, Ftn. 13).

An examination of the Louisiana sequestration statute clearly indicates that it is a "narrowly drawn" statute to meet an unusual condition (*Snaidach,* 395 U.S. at 339; *Fuentes,* 407 U.S. at 193), namely the fact that both

seller and buyer had current real interests in the property" (*Mitchell,* 416 U.S. at 604).

Louisiana statutes provide for sequestration where "one claims the ownership or right to possession of the property or a mortgage, lien or privilege thereon . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action" Art. 3571 (416 U.S. at 605, 623). The writ, however, will not issue on the conclusionary allegation of ownership or possessory rights. The writ shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts "shown by a verified petition or affidavit". Art. 3501 (416 U.S. at 605, 621). The clear showing required must be made to a judge and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond to protect the vendee against all damages in the event the sequestration is shown to have been inprovidently granted. Arts. 3501 and 3574 (416 U.S. at 605-606, 621-623).

"The writ is obtainable on the creditors ex parte application without notice to the debtor or opportunity for a hearing, *but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued'* Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order the return of the property and assess damages in favor of the debtor, including attorney's fees" (416 U.S. at 606, 622, emphasis supplied), which right is not granted by the New York Attachment Statute, and is a fatal defect therein, making it unconstitutional both on its face and in its application (see CPLR § 6223).

This Court narrowed the issue as "to one for a hearing on the issues in the possessory action—default, the exist-

ence of a lien and possesssion of the debtor—before property is taken'' (416 U.S. at 607).

Mr. Justice White in Part II of the court's opinion in sustaining the constitutional validity of the Louisiana sequestration statute gave five reasons why the statute was constitutionally valid (416 U.S. at 607-610), the clear implication being that all five requirements *must* be present to sustain the constitutionality of the statute, since it "protects the debtor's interest in every conceivable way" (416 U.S. at 618). Conversely none of such requirements are present in the New York Attachment Statute.

1. The seller has a vendor's lien on the property to be seized and because of the lien has an interest in the property, which may be even greater than that of the purchaser, measured by the unpaid balance of the purchase price (416 U.S. at 607-608). The New York Attachment Statute, does not relate to property in which the creditor has a vendor's lien or any possessory interest therein, but relates solely to property in which the creditor has no present interest and which is exclusively the property of the alleged debtor. As pointed out by the Court below "Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion" (J.S. 10a; 383 F.Supp. at 649) thereby making the New York Attachment Statute unconstitutional on its face.

2. "[T]here is real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller" (416 U.S. at 608-609). No such danger existed in the present proceeding since the property of the appellees was in the possession of a third party, National Sports and thus there was no "danger of destruction or alienation" pending notice and a hearing of the merits of appellees' claim making the New

York Attachment Statute unconstitutional, at least in its application herein.

3. "The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and * * * it comports with due process to permit the initial seizure on sworn ex parte documents followed by the early opportunity to put the creditor to his proof" (416 U.S. at 609-610). As Judge Lasker pointed out in convening the three-judge court below this "differs radically from the case at hand where the basis for attachment—fraud—is not amenable to such proof" (J.S. 29a; 377 F. Supp. at 1063) and as determined by the three-judge Court below "[t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief." (J.S. 11a; 383 F. Supp. at 650).[11] Furthermore, the New York Attachment

[11] The only claim of Curtis which might be said to "turn on the existence of the debt" and which might be an "uncomplicated matter that lend[s] [itself] to documentary proof" is that asserted against Champion Sports for monies due under the distribution agreement, and Champion was the only party in privity with Curtis against whom a debt might be said to exist. The claims asserted against Sugar and Wrestling Revue whose property was seized is based on a nebulous and farfetched theory of fraud, there being no creditor-debtor relationship, which involve extremely complicated factual and legal theories which must be established by Curtis and certainly do not lend themselves to "documentary proof". See affidavit of Stuart J. Freedman, Curtis' corporate secretary in support of the Order of Attachment (41a-46a), which is based on an "if" situation contrived in his imagination and is more fantasy than fact. These allegations constitute hearsay of the worst sort, and Freedman's testimony would be inadmissible at *any* hearing by any interpretation of the rules of evidence since he *never* engaged in any of the transactions, meetings or operational negotiations with any of the appellees during the course of the business relationships between Curtis and Champion Sports, and had *never* even met or spoken to Mr. Sugar.

Statute makes no provision for an "early opportunity to put the creditor to his proof" which is deferred until the eventual trial on the merits, which may be several years hence[12] which fails to minimize the risk of a wrongfully issued attachment, thus again making the New York Attachment Statute unconstitutional both on its face and in its application.

4. The impact on the debtor of deprivation of his property does not override his inability to make the creditor whole for wrongful possession and there is risk of destruction or alienation if notice and a prior hearing are supplied (416 U.S. at 610). There is no contention made by Curtis that either Sugar[13] or Wrestling Revue would be unable to pay any eventual judgment recovered against either of them by Curtis, nor does the New York Attachment Statute require such to be the case (CPLR § 6201). There certainly was no risk of destruction or alienation prior to notice and the holding of a hearing, since the property seized was in the hands of a third party, namely National Sports, again making the New York Attachment Statute unconstitutional both on its face and in its application herein.

5. The final and perhaps the most pervading reason that convinced this Court to sustain the constitutionality of the Louisiana sequestration procedure is the fact that "the debtor may immediately have a full hearing on the matter

[12] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two and a half years ago, the case has not as yet even reached the ready trial calendar, which is at least one and a half to two years behind, and there is no provision in the New York Attachment Statute to put the creditor to his proof, until the trial on the merits at some unknown date in the future.

[13] Sugar is a most substantial citizen, having deep roots in his community, the father of two children, a homeowner, a community leader, a nationally known sportswriter and currently employed in the communications business.

of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession." (416 U.S. at 610). This right of an immediate hearing requiring "the plaintiff to prove the grounds upon which the writ was issued" is not afforded under the New York Attachment Statute, which in and of itself makes it constitutionally invalid, as subsequently resoundingly pointed out by this Court in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751, in holding the Georgia garnishment statute unconstitutional for just such reason.

Concededly, Mr. Justice White refers to the fact that the seizure is permitted only by a judge's order and that "the process proceeds under judicial supervision and management" (416 U.S. at 619), however, he did not allude to such as one of the five basic requirements in sustaining the constitutional validity of the Louisiana statute, and the fact that a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid.[14]

In considering the breadth of the court's decision in *Mitchell* in determining the constitutional validity or invalidity of the New York Attachment Statute it must be borne in mind that this Court limited its application "to the constitutionality of the Louisiana sequestration proce-

[14] The fact that under New York CPLR § 6211 a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid for failure to provide an immediate and adequate post-attachment hearing requiring the creditor to prove the grounds upon which the attachment was granted or at least to establish probable cause therefor. "[T]he fact that the official who signs the writ after the ex parte application is a judge instead of a court clerk is of no constitutional significance." (*Mitchell* v. *W. T. Grant Company*, 416 U.S. at 632, dissenting opinion of Justice Stewart) and the "clerk-judge distinction" is of little significance (*North Georgia Finishings, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d at 765, dissenting opinion of Mr. Justice Blackman).

dures" (416 U.S. at 618, Footnote 13). Mr. Justice White specifically excluded from its application situations where the "property sequestered by the court is exclusively the property of the debtor" when he pointed out 416 U.S. at 604:

> "Plainly enough this is not a case where the property sequestered by the court is exclusively the property of the debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property * * *. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."

E. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 1975, —— U.S. ——, 42 L. Ed. 2d 751

On January 22, 1975, after the decision below, this Court, in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d 751, considered and held unconstitutional a not dissimilar Georgia garnishment statute which made "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment" (42 L. Ed. 2d at 751) being the very same reason that the District Court herein had just previously declared the challenged sections of the New York Attachment Statute unconstitutional.

In *Di-Chem* this Court reaffirmed the decision in *Fuentes* v. *Shevin*, 407 U.S. 67 that " '[a]ny significant taking of property by the State is within the purview of the Due Process Clause.' 407 U.S. at 86 [and that] [b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment" 42 L. Ed. 2d at 757.

For the same reasons as in *Fuentes* this Court held the Georgia statute unconstitutional holding 42 L. Ed. 2d at 757:

> "Here, a bank account, surely a form of property, was impounded and absent, a bond put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."

In so holding that the Georgia statute was unconstitutional in violation of the Due Process Clause this Court held 42 L. Ed. 2d at 751 that it was not saved by the more recent decision in *Mitchell* v. *W. T. Grant Company*, 416 U.S. 600 upholding the Louisana sequestration Statute since among other things "[t]he Louisiana law also expressly entitled the debtor to an immediate hearing after seizure, and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued" and that under the Georgia statute precisely as in the New York statute *sub judice*, a sizable amount of money was frozen,

> "and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment."[15]

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[15] In fact the Georgia statute actually affords the alleged debtor greater protection in certain respects than the New York statute since similar to the Louisiana statute upheld in *Mitchell* and the Florida and Pennsylvania statutes declared unconstitutional in *Fuentes*, the Georgia statute "requires plaintiff to file a bond in a sum double the amount sworn to be due" Ga. Code Ann. § 46-102, 42 L. Ed. 2d at 755, whereas the New York statute CPLR

(footnote continued on following page)

Mr. Justice Powell in his concurring opinion found "[t]he most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate post garnishment hearing" and in making "no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, nor any indication that the garnishor bears the burden of proving entitlement to the garnishment" 42 L. Ed. 2d at 761.

Likewise the challenged provisions of the New York Attachment Statute are unconstitutional in violation of the Due Process Clause since it makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual trial on the merits, which may be several years hence[16] and during such long delay, the seizure continues without abatement. "Due process requires that the State afford an opportunity for a prompt post-garnishment judicial hear-

(*footnote continued from preceding page*)

§ 6212(b) only requires the plaintiff to "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (see footnote 3, *ante* at p. 6). Of course "as a matter of constitutional principle, [a bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind" (*Fuentes* v. *Shevin*, 407 U.S. at 83-84).

[16] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two and a half years ago, the case has just recently been placed on the trial calendar by Curtis, which is almost another two years behind. Thus it will be almost three years from the time of the attachment until appellees receive their hearing on the merits which will enable them for the first time to seek to dissolve the attachment by putting Curtis to its proof, and during such entire period of time appellees have been deprived of their money amounting to $24,324.17.

ing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 42 L. Ed. 2d at 760, concurring opinion of Mr. Justice Powell).

The District Court applied *Mitchell* to the challenged provisions of the New York Statute (CPLR §§ 6201(4), (5) and (8) and § 6211) in the same manner as this Court most recently did to the Georgia Statute in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* to determine whether it could "squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*" (J.S. 6a; 383 F. Supp. at 647). As this Court found "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana Statute" (42 L. Ed 2d at 757), so the District Court found that "the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and] the opportunity for such a hearing was critical to the holding in *Mitchell*, and its absence renders New York's Statute fatally defective" (J.S. 7a-8a; 383 F. Supp. at 648). Any doubt on this point was laid to rest by this Court in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*

F. The New York Attachment Statute and Due Process

Pervading throughout the decision in *Mitchell* is the fact that the Louisiana sequestration procedure provides and entitles "the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued" (416 U.S. at 606) and, "the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession." (416 U.S. at 610). Thus,

under the Louisiana sequestration procedure the debtor may immediately seek a hearing on the merits at which the burden of proof is upon the plaintiff to prove the grounds upon which the writ was issued.[17]

There is no similar provision in the New York Attachment Statute which grants to the defendant an immediate hearing or for that matter, any hearing, prior to the eventual trial on the merits, requiring the plaintiff to prove the grounds upon which the attachment was granted thus making the New York Attachment Statute unconstitutional, both on its face and in its application.

The only section of Article 62 which permits the defendant to seek a dissolution of the attachment is § 6223 of the New York Civil Practice Law and Rules[18] where the burden is on the defendant to prove that the plaintiff is not entitled to an order of attachment, and the court cannot consider the merits of the controversy.

The New York cases interpreting § 6223 and its predecessor are legion that unless the papers upon which

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[17] Article 3506 of the Louisiana Code of Civil Procedure provides:

> "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued" (416 U.S. at 622).

[18] § 6223 of the New York Civil Practice Law and Rules provides:

> "Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move on notice to each party and the Sheriff, for an order vacating or modifying the order of attachment. Upon motion the court shall give the plaintiff a reasonable opportunity to correct any defect. If after the defendant has appeared in the action the court determines that the attachment is unnecessary to the security of the plaintiff it shall vacate the order of attachment."

the attachment was based "clearly indicate that the plaintiffs must ultimately fail" the attachment may not be vacated (*Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 1923, 234 N.Y. 372, 377). The burden is upon the defendant whose property has been seized without notice or hearing to establish that the plaintiff cannot succeed in the action (*Bard-Parker Co.* v. *Dictograph Products Co.,* App. Div. 1st Dept. 1940, 258 App. Div. 638, 17 N.Y.S. 2d 588) and the burden of proof as to whether plaintiff has shown a valid and meritorious cause of action to support the order of attachment is upon the party seeking to vacate it (*American Reserve Ins. Co.* v. *China Ins. Co.,* 1948, 297 N.Y. 322, 79 N.E. 2d 425; *Cocoline Chocolate Company* v. *Hillside Enterprises, Inc.,* Sup. Kings County 1965, 45 Misc. 2d 594, 257 N.Y.S. 2d 444; *Auerbach* v. *Grand Nat. Pictures, Limited,* Sup. N.Y. County 1941, 176 Misc. 1031, 29 N.Y.S. 2d 747). The burden of proof is upon the defendant to establish that the attachment is unnecessary (*Hydromar Corporation of Delaware* v. *Construction Aggregates Corporation,* App. Div. 1st Dept. 1969, 32 A.D. 2d 749, 300 N.Y.S. 2d 797; *George A. Fuller Company* v. *Vitro Corporation of America,* App. Div. 1st Dept. 1966, 26 A.D. 2d 916, 274 N.Y.S. 2d 600; *Zeiberg* v. *Robosonics, Inc.,* App. Term, 1st Dept. 1964, 43 Misc. 2d 134, 250 N.Y.S. 2d 368; *B. B. Weit Printing Inc.* v. *Frances Denney, Inc.,* S.D.N.Y. 1969, 300 F. Supp. 405; *Kend* v. *Chroma-Glo, Inc.,* D. Minn. 1970, 51 F.R.D. 547).

Unlike the Louisiana sequestration procedure which requires the plaintiff to prove the grounds upon which the writ was issued, the merits of the controversy may not be considered by the court and are irrelevant on a motion to vacate the attachment under § 6223 (*Kneapler* v. *Braufman,* App. Div. 2d Dept. 1943, 266 App. Div. 756, 41 N.Y.S. 2d 261; *Bard-Parker Co., Inc.* v. *Dictograph Products Co., Inc., supra; Marklin* v. *Drew Properties Corp.,* S.D.N.Y. 1967, 280 F. Supp. 176).

In *Marklin* v. *Drew Properties Corp., supra,* Judge Motley pointed this distressing fact out, 280 F. Supp. at 179:

> "Under the law of New York it is settled that: '• • • the court should not attempt to decide in advance the merits of the controversy by vacating the attachment unless the complaint and affidavits *clearly indicate* that the plaintiff *must* ultimately fail'" (citing cases).

Thus, under the New York law the defendant, whose property has been seized without notice and hearing, cannot even secure a hearing prior to the eventual trial on the merits, to require the plaintiff to prove the grounds upon which the attachment was granted. The limited hearing provided for in § 6223 shifts the burden to the defendant, and he must prove as a matter of law that the plaintiff cannot succeed under any state of facts, a truly insurmountable task, and the court at such a hearing is even prevented from considering the merits of the controversy.

The Supreme Court has held that "it is plain that where the burden of proof lies may be decisive of the outcome" (*Speiser* v. *Randall,* 1958, 357 U.S. 513, 525), and shifting that burden from the plaintiff to the defendant, as a result of the failure to give the defendant prior notice and hearing is a denial of due process since "these burdens would not have been imposed upon [the defendants] had [they] beeen given timely notice in accord with the Constitution" (*Armstrong* v. *Manzo,* 1965, 380 U.S. 545, 551). As pointed out by Mr. Justice Stewart, 380 U.S. at 551.

> "Had the petitioner been given the timely notice which the constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case against whatever defenses the petitioner might have interposed. • • • Had neither side offered any evidence those who initiated the adoption proceedings could not have prevailed.

> "Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For it is plain that where the burden of proof lies may be decisive of the outcome. Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Yet these burdens would not have been imposed upon him and he been given timely notice in accord with the Constitution."

Thus, the New York Attachment Statute is constitutionally invalid on its face and in its application since it makes no provision whatsoever for an immediate hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual trial on the merits, which may be several years hence. Due process requires that the right to such hearing "must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo,* 380 U.S. at 552), and the deferring of such hearing until the eventual trial on the merits is constitutionally impermissible when one's property has been seized without notice and hearing.

What limited hearing that is provided for under § 6223 shifts the burden of proof to the defendant, who received no notice or opportunity to be heard prior to the granting of the order of attachment authorizing the seizure and upon such hearing the plaintiff is not required to prove anything but rather the defendant must either establish that the plaintiff must fail under any state of facts as a matter of law, or else the attachment continues, no matter

how weak or far-fetched is the plaintiffs' case, and the court is prevented from considering the merits of the controversy.

The appellants urge this court with the argument that the District Court erred in its interpretations of the New York law by limiting the basis for vacatur to "unnecessary security." They further argue that such findings by the District Court were found to be erroneous by recent state court decisions rendered since the decision of the District Court. Appellants contend that none of such decisions have accepted the District Court conclusion that there is no meaningful opportunity to vacate an attachment. It would appear that appellants would urge on this Court that the recent rash of decisions by the lower courts of New York are dispositive of the issue that no meaningful early hearing is available by which a defendant may vacate an order of attachment.

The argument of the appellants has a fundamental failing. Such argument assumes that vacaturs granted by such lower courts of New York for jurisdictional purposes satisfy the District Court's objections.

In *Regnell* v. *Page,* New York Law Journal (N.Y.L.J.) May 23, 1975, p. 14, c. 2 (Sup. Ct., N.Y. Co. Fein, J.) the court found that

> "[T]he papers in support of the attachment indicate a concession by defendants that the reports were false and that underpayments were made. *A hearing under such circumstances would have no valid purpose."* (emphasis supplied)

Thus the principal lower court case upon which appellants rely clearly establishes that at the very most the New York Courts need not grant "a hearing" as a matter of right. The citations of authority and argument in *Regnell* with respect to the New York Attachment Statutes contradicts the constitutional imperative of an early post-garnishment hearing.

In *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974), the court vacated the attachment in part pursuant to the New York Attachment Statutes on jurisdictional grounds because plaintiffs had failed to establish a *prima facie* case of any intent to defraud creditors. The court stated that such intent cannot be "presumed". The mere disposition and removal of property does not satisfy the allegations necessary to sustain a *prima facie* case and thus the Court vacated on jurisdictional grounds.

In *Macmillan, Inc.* v. *Hafner,* 42 A D 2d 533, 344 N.Y.S. 2d 729 (1st Dept. 1973), the attachment was vacated because the plaintiff failed to present "but a scintilla of proof as to the requisite elements of a fraud case" in support of its application for the drastic remedy of attachment. The writ of attachment accordingly was vacated for jurisdictional reasons.

In *Richman* v. *Richman,* 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973), that appellate court vacated an attachment because the affidavit in support of the writ of attachment failed to set forth facts to sustain the allegations. Accordingly, the record before the court was insufficient to sustain the issuance of the writ of attachment for jurisdictional reasons to support the drastic remedy of attachment.

Again in *Martin Enterprises, Inc.* v. *MS. Caplin Co.,* 45 A D 2d 883, 358 N.Y.S. 2d 160 (2d Dept. 1974), the Court again struck down a writ of attachment for jurisdictional purposes since the affidavit and exhibits failed to establish the commission of the intentional torts pleaded. The court struck down the drastic remedy of attachment in that the plaintiff failed to set forth the jurisdictional elements necessary to sustain the drastic remedy of attachment. Nowhere in the decisions of recent vintage cited by the appellants is there language that a defendant is entitled to an early post-garnishment hearing as a matter of right. (*Marshall, Bratter, Greene, Allison & Tucker* v. *Knight,*

N.Y.L.J., Dec. 20, 1974, p. 2, c. 3; *Salerno* v. *Salerno*, N.Y.L.J., Jan. 24, 1975, p. 18, c. 2; *Boston Old Colony Ins. Co.* v. *Bianchi*, N.Y.L.J., Feb. 26, 1975, p. 16, c. 1; *New York Auction Co.* v. *Belt*, N.Y.L.J., April 9, 1975, p. 17, c. 3). In fact, in *Regnell* v. *Page*, so heavily relied upon by appellants, the court states that "a hearing under such circumstances would have no valid purpose." Can we say that the Fourteenth Amendment's constitutional imperative is satisfied by the discretionary authority in the hands of the judiciary to grant a hearing? Surely the mandate of this court in *Snaidach, Fuentes, Mitchell* and *Di-Chem* is not met by the express language or the judicial interpretations of the New York Attachment Statute.

This outrageous result is a flagrant and blatant deprivation of due process, which would never be approved by the Supreme Court either under the *Snaidach, Fuentes* or *Mitchell* standards. Even assuming that the breadth of *Mitchell* is such that it is applicable to prejudgment proceedings where the creditor has no present interest in the property to be seized, the fact that Article 62 does not enable the debtor whose property has been seized, without notice or hearing to seek dissolution of the attachment unless the plaintiff proves the grounds upon which the order of attachment was issued, makes the New York Attachment constitutionally invalid, on both its face and in its application.

Under the New York Attachment Statute the plaintiff is not required to prove the grounds upon which the Order of Attachment was issued, either before or after its issuance, and may defer such proof until the eventual trial which may be many years hence, which of course is constitutionally impermissible and requires that it be declared unconstitutional in violation of the due process clause for that reason alone.

POINT II

The New York Attachment Statute is not so narrowly drawn as to limit its affect to unusual conditions where a creditor could show that the debtor will destroy or conceal the property to be seized, in which the creditor has an interest and is therefore constitutionally impermissible.

In *Fuentes* the Supreme Court, indicated that it would permit a prejudgment seizure of property without notice and hearing in a case "in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods [but that the statute would have to be] narrowly drawn to meet any such unusual condition" (407 U.S. at 93).

The Louisiana sequestration procedure upheld by the Supreme Court in *Mitchell* was so narrowly drawn to meet such unusual conditions in that it was limited to a situation where the creditor had a specific right in the property to be seized, but only if the defendant has it within his power "to conceal, dispose of, or waste the property" (Louisiana Code of Civil Procedure, Art. 3571, 40 L. Ed. 2d at 422).

However, the New York Attachment Statute is not so narrowly drawn, nor is its application limited to property in which the creditor has an interest. In fact it does not even relate to such type property, which is covered by Article 71 of the Civil Practice Law and Rules, which after having been declared unconstitutional was amended to comport with due process (see p. 20, *ante*). Nor with the possible exception of subparagraph 4 of § 6201 is it limited to situations where the defendant has or may conceal or dispose of his property. (See Memorandum Opinion of Judge Lasker [J.S. 15a-30a at 28a].)

The pertinent provisions of § 6201 which are herein involved are subparagraphs (4), (5) and (8), which authorize an order of attachment when

> "4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or
>
> "5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or
>
> "8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

The order of attachment herein was granted against Champion Sports under subparagraphs (4), (5) and (8) against Sugar under subparagraphs (5) and (8) and against Wrestling Revue under subparagraph (8) *only* (see p. *ante*). Pursuant thereto the Sheriff seized wages of Sugar in the amount of $124.17 and monies belonging to Wrestling Revue of $24,200, all from National Sports, in which Curtis had no interest whatsoever. No property of Champion Sports was ever seized, and it was the only defendant against whom Curtis claimed a state of facts relating to the disposition or secretion of property.

With respect to the seizure of Sugar's wages under subparagraphs (5) and (7) this unquestionably was a due process deprivation under the rule of *Snaidach,* which no matter what the breadth and scope of *Mitchell,* requires the declaring as unconstitutional the New York attachment procedures as it relates to wages as being unconstitutional.

Finally, the court is left with the final question of whether or not subparagraph (8) under which all of Wrestling Revue's monies, amounting to $24,200 was seized, can survive a constitutional attack under the rules

of *Snaidach, Fuentes, Mitchell* and *Di-Chem.* The plaintiffs submit that it cannot.

A constitutional attack on CPLR § 6201(8) was launched in the New York State Courts shortly after the Supreme Court decision in *Fuentes.* In *Richman* v. *Richman,* Sup. Albany County 1973, 72 Misc. 2d 803, 339 N.Y.S. 2d 589, the trial court in declaring § 6201(8) unconstitutional stated:

> "It is the opinion of this Court that CPLR § 6201, Subdivision 8, which is the subdivision that the plaintiff proceeded under in obtaining the order of attachment in the instant case, is not, when read in conjunction with Section 6211 CPLR, in conformity with due process. It does not contemplate one of the extraordinary situations necessary to secure jurisdiction. (Ownbey v. Morgan, 1920, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837).
>
> • • • •
>
> "This Court is of the opinion that Subdivision 8 of CPLR 6201 is the section least likely to survive and is of the further opinion that it cannot survive for there is no foreseeable important governmental or public interest or 'unusual' situations which would warrant a denial of a prehearing."

However, the Appellate Division, Third Department, at the urging of Attorney-General of New York, refused to rule on the constitutional question, and affirmed the order of the trial court on other grounds (*Richman* v. *Richman,* 1973, 41 A.D. 2d 993, 344 N.Y.S. 2d 52).

Subparagraph (8) permits an order of attachment in any action for "conversion • • • or for fraud or deceit". The plaintiff need have no interest in the property to be seized, nor need he allege or establish any facts relating to secretion or disposition of the property. All he need

allege is that he has a cause of action for conversion or for fraud or deceit, and no matter how weak, nebulous or far-fetched his case is he need not prove the facts upon which the attachment was granted until the eventual trial on the merits, and unless the defendant can sustain the insurmountable burden that the plaintiff must ultimately fail, he cannot seek a dissolution of the attachment. This is an outrageous deprivation of due process in violation of the Fourteenth Amendment for the reasons set forth by this Court in *Snaidach, Fuentes, Mitchell* and *Di-Chem,* and for the further reasons set forth in this Brief, requiring this Court to affirm the decision below that the New York attachment procedures are constitutionally impermissible.

The deprivation of due process is more onerous where the color of due process is alleged or claimed without according the defendant any hearing to correct the seizure of property. The "hearing," "burden of proof," "right to vacate," and other rights of due process alleged to exist here are not meaningfully available. This is precisely what the Court referred to in *Coe* v. *Armour Fertilizer Works,* 1915, 237 U.S. 415 at 424, 425, when it stated:

> "Nor can extra-official or casual notice or a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. * * * The law must require notice to [defendants] and give them the right to a hearing and an opportunity to be heard."

This Court made it ever so clear that statutory vagueness, as in the New York attachment procedure is constitutionally impermissible and "the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." 237 U.S. 425 citing *Roller* v. *Holly,* 176 U.S. 398, 409.

CONCLUSION

The New York Attachment Statute is constitutionally impermissible and the findings and order of the court below should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-858

74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS CAREY, FINE BEISHEIM AND ATTORNEY GENERAL *PRO SE*

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IN THE

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and

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS CAREY, FINE BEISHEIM AND ATTORNEY GENERAL *PRO SE*

Statement

This reply brief is submitted in response to the Brief for Appellees and the Brief *Amicus Curiae* of the Legal Aid Society of New York City.

I. New York's attachment statute fully complies with due process.

As we and the Curtis appellants have noted, due process is not an inflexible requirement, but rather must be considered in light of the situation at hand. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610. Rather than approach New York's attachment statute (Civil Practice Law and Rules, Art. 62) in that context, the appellees inexcusably seek to read *Mitchell* as inexorably and precisely requiring every element of the Louisiana sequestration statute upheld therein. This is plainly a gross distortion of *Mitchell.*

Appellees further contend that New York meets none of the *Mitchell* standards and in this respect go way beyond even the District Court opinion which only found "no meaningful opportunity to vacate an order of attachment" (J.S. 12a). That this is the commonly accepted understanding of the decision below is confirmed by several recent federal decisions. *Stanton* v. *Manufacturers Hanover Trust Co.*, 388 F. Supp. 1171 (S.D.N.Y. 1975); *Usdan* v. *Dunn Paper Co.*, 392 F. Supp. 953 (E.D.N.Y. 1975).*

To reply as to (1) the vendor's lien; Appellee's Brief, p. 26: Points II of both the Carey Brief (pp. 21-24) and Curtis Brief (pp. 31-32) amply demonstrate that lack of a vendor's lien does not make attachment subject to challenge on its face. *Mitchell,* 416 U.S., at 607-608, does not stand for appellee's proposition. It only shows Louisiana's interest in protecting a vendor's lien. New York has a similar interest in protecting against fraud.

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* It is interesting to note that both these cases upheld jurisdictional attachments under CPLR Art. 6201(1) against due process attack. Thus they are contrary to *Vath* v. *Israel,* 80 Misc 2d 759, 364 N.Y.S. 2d 97 (Sup. Ct., Queens Co., 1975), which is hardly controlling. *Vath's* alternate holding should be the decision. Cf. *Sutton* v. *Garcia,* 80 Misc 2d 690, 363 N.Y.S. 2d 695 (Sup. Ct., N.Y. Co. 1974).

(2) Risk of transfer or concealment. Appellee's Brief, p. 26 asserts there was no risk of this because the third party (National) had possession. This is wholly untenable. The convening decision rejected such contention (J.S. 17a-19a). As stated there (J.S. 19a), if there was no attachment "National would then be free, now as before, to turn the money over to Wrestling or to continue to withhold it".* If it were clear that the attachment did not change the situation, appellees presented "no real case or controversy," *Golden* v. *Zwickler,* 394 U.S. 103, 110 (1969). Or they should have moved under CPLR 6223 in the state court to vacate the attachment, as "unnecessary to the security of the plaintiff."**

---

* In fact, a single judge should not have rejected the claim, but should have sent it on to the three-judge court. (Cf. J.S. 25a)

** At the time of the convening opinion, 377 F. Supp. 1055, the appellants raised abstention. (J.S. 19a). It was rejected but also passed on to the three-judge court (J.S. 25a) which implicitly rejected it, as it was not discussed. The answer of Curtis presents these defenses (App. 33a-34a).

As the District Court did not have occasion to treat *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 43 L. Ed. 2d 482 (1975), since it was not decided at the time, this Court should consider its applicability. While in *Huffman* the state court proceedings was viewed as quasi-criminal, there is clear language in *Huffman* to apply its principle of non-intervention to the instant case. *Huffman,* 43 L. Ed. 2d, at 492:

> "The component of Younger which rests upon the treat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The interference by the federal courts with pending state court jurisdiction in the instant case is obvious. By instituting an independent suit in federal court, the appellees herein effectively prevented the state court from ruling on the correctness of the attachment via a 6223 motion. Moreover, by this action the appellees isolated the constitutional issue, which if it had been raised in a state court on a motion to vacate might not have been necessary to rule on, as the attachment on the merits might have fallen. *Cf. Richman* v. *Richman,* 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973).

(3) The ease of proof. The appellees and the *amicus curiae* appear to be at odds on this issue. The appellees state that "fraud" is not easy of proof, following the opinion below (Br. p. 27) but the *amicus curiae* states the proof is too easy (A.C. Brief, pp. 8 *et seq.*), i.e. that plaintiff need only show a *prima facie* case and the defendant has a burden to show that the action "must inevitably fail". (A.C. Brief pp. 35 *et seq.*)

Actually the reality probably lies somewhere in between. In the myriad of New York decisions on motions to vacate attachments, at some point most any phrase can be seized on to support one's proposition. It must be clear that attachment in New York is a *discretionary* remedy. The plaintiff must convince the judge he is entitled to the remedy.

In a decision by then Judge Cardozo, many relevant principles are set forth. *Zenith Bathing Pavilion* v. *Fair Oaks S.S. Corp.*, 240 N.Y. 307, 148 N.E. 532 (1925). At 312, the Judge wrote "(w)hat is sufficient for a pleading may be insufficient for attachment". There must be "evidence" to sustain an attachment and at 313, "(p)rovisional remedies are not granted for the asking."

If, as appellees assert, ftn. 12 to Br., p. 27, Curtis' claim "is more fantasy than fact", then they should have moved immediately in the state court under Section 6223 to vacate the attachment. Suspicion or rumor cannot support an attachment in New York. Some "evidentiary facts," to be presented by plaintiff, are necessary. *A.M.F. Inc.* v. *Algo Distributors, Inc.*, 48 A D 2d 352, 358, 369 N.Y.S. 2d 460 (2d Dept. 1975).*

It defies criticism that a judicial officer has the discretion to vacate the attachment order "when evidence though not lacking altogether, may seem too weak or

* This is a definitive appellate decision upholding the constitutionality of attachment and refusing to follow the opinion below.

uncertain to justify the remedy", *A.M.F. Inc., supra,* at 361, quoting *Zenith Bathing Pavilion,* 240 N.Y. at 313. Obviously the New York Courts will not uphold attachments where there is a mere scintilla of proof. That appellees have never made a motion under Section 6223 to vacate does not mean that an early hearing on the validity is not available. Even in Louisiana there will be no early hearing if the defendant fails to affirmatively make a motion.

(4) Impact on debtor. The appellees are utterly nonsensical here. If "Sugar is a most substantial citizen . . ." (ftn. 13, to Br., p. 28) then he should be able to discharge the attachment, CPLR 6222. The instant action involves a commercial transaction.

(5) The post-order hearing. The plaintiff must in New York show or prove he is entitled to the attachment. When a Section 6223 motion is presented, assuming defendant has made a showing to vacate it on his papers, the burden shifts. Ultimately the judge must weigh the proofs.

II. The CPLR 6223 hearing may be legal or factual.

Appellees' Br. p. 38, contends that *Regnell* v. *Page,* Appendix B to our main Brief, now reported at 82 Misc 2d 506, denied the defendant a "hearing". Hearings take many forms. If a question of *law,* no evidence need be taken. If a question of *fact,* an evidentiary hearing may be held (Appellants' Br., p. 35). Obviously, under CPLR 6223, a motion can be made immediately to vacate the attachment, and a judge will "hear" the proponent and opponent. This is a "hearing". To grant an evidentiary hearing in every case would be to try the case on the merits when only the right to attachment is in issue. But it can be a factual issue, under Section 6223, whether the attachment is necessary to the security of the plaintiff. *Maitrejean* v. *Levon Properties, infra,* Point IV.

III. The fact that only a judge may grant an attachment disproves the claim of appellee.

Much or all of the constitutional discussion on the validity of *ex parte* pre-judgment remedies centers around four decisions of this Court. (1) *Sniadach* v. *Family Finance Corp. of Bayview,* 395 U.S. 337 (1969); (2) *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); (3) *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974) and (4) *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* —— U.S. ——, 42 L.Ed. 2d 751 (1975). In three (*Sniadach, Fuentes,* and *Di-Chem*) the Court's decision invalidated the remedy. In *Mitchell,* of course, it was upheld. And the most obvious difference of *Mitchell,* lacking in all the other cases is that a judge, and not a court clerk, granted the remedy. This implies discretion, an examination of respective rights and a proof of need to be exercised. This is exactly the case in New York.

Di-Chem, supra, which appellees rely on does not affect the instant appeal at all. First, the opinion in *Di-Chem, id.* at 757 emphasizes that in *Mitchell* "(t)he writ, however, was issuable only by a judge upon filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration." It is only a further point—that Louisiana allows an immediate hearing where the writ can be dissolved absent proof by the creditor of his grounds for granting of the writ. No mention is made of "burden of proof." In New York, on the Section 6223 motion to vacate, the plaintiff must also present proof or evidence to support the initial issuance, or the attachment will be vacated.

Fundamental to *Mitchell* and *Di-Chem* appears to be that the State not allow one party to a dispute by an application to a ministerial official, to bring into play the power of the State. As undisputed, New York has judicial control of attachment from start to finish.

IV. In the context of granting and vacating attachment, burden of proof is not a vital consideration.

While it is true in some instances that where the burden of proof lies may be decisive, *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958), in the instant case where the burden of proof lies on a motion to vacate is truly irrelevant. The law does not mention it and, depending on the circumstances, the judge can place it where he considers proper. This flows from the fact that a plaintiff in New York must show he is entitled to the attachment by competent proof on the *ex parte* application and again on any Section 6223 motion by the defendant to vacate. *Zenith Pavilion, supra.* However, in many situations, the proof of the grounds of vacatur, *i.e.* that it is unnecessary to the security of the plaintiff, may lie only with defendant. *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974).

Reliance upon *Armstrong* v. *Manzo,* 380 U.S. 545, 511 (1965), is misplaced. The burden of proof in New York does not change because the initial grant was *ex parte. Armstrong* involved setting aside a final judgment. This Court pointed out the real burdens the moving party faced. On the other hand, on a Section 6223 motion, plaintiff must still show facts to support attachment or, in other words, prove the grounds of his attachment.

And, as said in *Regnell* v. *Page* (Br., App. Carey *et al.,* p. 34):

> "That due process is necessarily violated by imposing the burden of proof on defendant is not nearly as clear as Sugar suggests (*Leland* v. *Oregon,* 343 U.S. 790; *U.S.* v. *Ill. Central R.R.,* 291 U.S. 457)."

And further *Regnell* goes on to show that the burden really is not on defendant in a fraud situation as the case at hand.

Appellees (Br. 34-40) totally confuse the state of the law in New York as to what a plaintiff must show to support

attachment. The numerous New York cases vacating attachments do so for a number of reasons. Appellees stating, the *nisi prius* court or the appeal court did so for "jurisdictional" grounds evidences misconception. In every case the *facts* as shown or proven by plaintiff failed to satisfy the grounds (CPLR 6201) for attachment. Attachment still is a discretionary remedy in New York.

The *amicus* brief also engages in this purposeful distortion of New York law. There are certain fundamental requirements to allow attachment. In New York, plaintiff must present proof of a *prima facie* case and or additionally the intent to defraud. *Amicus* (A.C. Br. p. 23) also explicitly concedes that the plaintiff or "creditor [in New York] need only sustain again [on a 6223 motion] the burden which was required of him in obtaining the initial attachment . . ."

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York, October 30, 1975.

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IN THE

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OCTOBER TERM, 1975

No. 74-858
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CURTIS CIRCULATION COMPANY, et al.,

Appellants,

-v.-

BERT RANDOLPH SUGAR and
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-858
No. 74-859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, HUGH L. CAREY, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT AND GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

-v.-

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES, AND STATEMENT OF INTEREST OF THE AMICUS

The Legal Aid Society of New York City respectfully moves the Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of appellees, Bert Randolph Sugar and Wrestling Revue, Inc., by reason of The Society's substantial interest in the outcome of this case and its ability to assist this Court in the resolution of the constitutional issue presented herein.

(1) Movant The Legal Aid Society of New York City is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate means to employ other counsel.

(2) The question presented in this case concerning the constitutionality of New York's pre-judgment property attachment procedure, contained in Article 62 of the New York Civil Practice Law and Rules, is of basic importance to hundreds of indigent New York City residents whom The Society serves. A significant number of the Society's clients are low-income persons whose wages or public assistance benefits, deposited in bank accounts and often representing the very means of their subsistence, are summarily seized, often wrongfully, pursuant to the procedures challenged herein. The Society therefore has an obvious and immediate interest in the issue before the Court in this case.

(3) The Society has in the past liti-

gated cases seeking to insure that summary creditor pre-judgment remedies fully comport with the requirements of procedural due process. E.g., Hernandez v. European Auto Collision, Inc., 487 F. 2d 378 (2 Cir., 1973); Blye v. Globe-Wernicke Realty Corp., 33 N.Y.2d 15 (1973).

(4) Because of its long experience with the operation and effect of the New York pre-judgment property attachment procedure The Society is in a unique position to analyze the state law questions which are crucial to the resolution of the constitutional question presented herein. In particular The Society seeks to assist the Court in its determination of the focal issue here of the scope and nature of the post-attachment hearing under section 6223 of the New York Civil Practice

Law and Rules, as construed by the New York State Courts.

(5) Counsel for appellees has consented to the filing of this brief amicus curiae. This motion is filed because counsel for each of the appellants has refused consent.

WHEREFORE, movants pray that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

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IN THE

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Appellants,

-v.-

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY IN SUPPORT OF APPELLEES

STATEMENT OF THE CASE

This case presents the question of the constitutionality, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, of the New York pre-judgment property attachment procedure contained in Article 62 of the New York Civil Practice Law and Rules (hereinafter "CPLR"), section 6201 et seq.

The factual background which led to the institution of this action is fully set forth in the opinions below in this case. 377 F. Supp. 1056, 1057 and 383 F. Supp. 643, 644-5. Briefly, Curtis Circulation Company moved in New York State Supreme

Court, New York County, on grounds of alleged fraud and a cause of action for breach of contract, for an order of attachment directing the sheriff to levy on any property of Bert Randolph Sugar or of Champion Sports Publishing, Inc., or Wrestling Revue, Inc., both corporations controlled by Sugar. Without notice to the alleged debtors and prior to the filing of a complaint, a New York State Supreme Court Justice granted the order of attachment pursuant to CPLR Article 62 and the sheriff proceeded to levy on sums owed to Sugar and Wrestling.

Sugar and Wrestling then filed this action under 42 U.S.C. §1983 in Federal Court challenging the constitutionality of the New York pre-judgment property attachment procedure contained in CPLR Article

62, and, in particular, CPLR §§6201 (4), (5) and (8), which authorize ex parte attachment on the grounds of the debtor's alleged fraud. District Judge Lasker found that the complaint presented a substantial constitutional question and granted plaintiffs' motion to convene a three-judge court. 377 F. Supp. 1063 (S.D.N.Y., 1974). The three-judge court thereupon declared the challenged provisions of the New York pre-judgment property attachment statute unconstitutional as violative of due process of law and enjoined their enforcement, primarily because they failed to guarantee the debtor a constitutionally adequate opportunity to vacate the ex parte attachment. 383 F. Supp. 643 (S.D.N.Y., 1974).

Defendants appealed to this Court from

the judgment of the three-judge court pursuant to 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on April 14, 1975.

SUMMARY OF ARGUMENT

Fundamental principles of procedural due process require that summary pre-judgment property attachment procedures strike a fair balance between the conflicting interests of creditor and debtor. How that balance is struck and precisely what procedural safeguards are required by due process in a given case are basically a function of the risk of error inherent in the particular ex parte attachment procedure, evaluated in light of the benefit to the creditor and the burden on the debtor of a pre-judgment taking of the property.

The principles established by this Court in its recent constitutional decisions in the area of creditor pre-judgment remedies dictate that, in order to strike the con-

stitutionally required balance, the New York pre-judgment attachment statute must guarantee to the debtor the prompt return of his property, initially seized ex parte, unless the creditor proves the grounds of the attachment at a genuinely adversary hearing.

A careful analysis of New York law plainly discloses that the post-attachment hearing afforded by the New York pre-judgment property attachment statute, far from measuring up to the due process requirement of a guaranteed meaningful opportunity for the debtor to regain possession of his seized property, is basically a sham hearing which overwhelmingly favors the creditor's interest. This fundamental due process deficiency in the New York procedure renders it patently unconstitutional.

ARGUMENT

THE CHALLENGED PROVISIONS OF NEW YORK'S PRE-JUDGMENT PROPERTY ATTACHMENT STATUTE ARE VIOLATIVE OF DUE PROCESS FOR FAILURE TO GUARANTEE THE DEBTOR THE RETURN OF HIS PROPERTY, SEIZED EX PARTE, UNLESS THE CREDITOR PROVES THE GROUNDS FOR THE ATTACHMENT.

A. At A Minimum Due Process Requires That An Ex Parte Attachment Under A General Pre-Judgment Property Attachment Statute Be Promptly Vacated Unless The Creditor Proves At An Adversary Hearing The Grounds For The Attachment.

Pre-judgment property attachment and garnishment remedies serve legitimate state interests in facilitating a creditor's recovery on a potential judgment by ensuring that the alleged debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim. However, inherent in a pre-judgment property

attachment obtained on the creditor's ex parte application is the substantial risk of a wrongful or unnecessary taking of the debtor's property, since the attachment occurs without prior notice to the debtor and the opportunity for him to defend. Fundamental principles of procedural due process require that a pre-judgment attachment procedure must effect a fair accommodation of the conflicting interests of the creditor and debtor, and, in particular, must contain procedural safeguards adequate to guard against an erroneous use of an ex parte pre-judgment remedy.

As the issues made relevant to the attachment become broader and more complex, the risk of a wrongful taking from an ex parte attachment increases correspondingly. The absence of any pre-existing creditor

interest in the particular property seized also enhances the likelihood of the abuse of the pre-judgment remedy by a creditor without a valid claim. In addition, the creditor's need for a pre-judgment taking is substantially diminished where he lacks a prior interest in the property to be seized and where there is little danger that the debtor will alienate or waste the property pending a hearing. Finally, the greater the level of deprivation to the debtor which may flow from a pre-judgment property seizure, the less tolerance there should be of the risk of an erroneous taking.

A careful weighing and balancing of these several factors bearing on the risk of a wrongful taking and on the relative creditor benefit and debtor burden of a

pre-judgment property seizure have guided this Court in recent years in passing on the constitutionality of summary pre-judgment remedies. Thus this Court has held that due process requires notice and an opportunity for the debtor to be heard prior to the garnishment of a significant portion of a person's wages, because of the potentially devastating impact upon a wage earner's family of a wage garnishment, the likelihood of error arising from fraudulent creditor claims, the creditor's lack of a pre-existing interest in the property seized, and the minimal risk of leaving the wages in the debtor's possession. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Replevin or sequestration procedures permitting an installment seller to summarily repossess goods

which he has sold and in which he has a substantial pre-existing property interest have presented different problems. There the creditor's interest in and need for ex parte pre-judgment seizure are strong, since there will be an inevitable deterioration in the value of the creditor's security if the buyer remains in possession of the goods and uses them pending trial and since there is a real risk that if given prior notice of a hearing the buyer will conceal or transfer the merchandise to the damage of the seller. On the other hand, the impact on the debtor of loss of particular items of household furniture is potentially far less severe than that flowing from deprivation of wages. With these considerations in mind, this Court has held that due process requires pre-seizure

notice and opportunity for the debtor to be heard in circumstances where broad and relatively complex issues are made relevant to the replevin, the replevin procedure fails to require any judicial supervision or control over the property seizure, and there is no guarantee that an adversary hearing will occur relatively promptly, if at all, after the seizure. Fuentes v. Shevin, 407 U.S. 67 (1972). On the other hand, an ex parte replevin procedure satisfies due process requirements in cases where the issues made relevant to the replevin are narrowly confined and relatively uncomplicated, the ex parte seizure is initially subject to strict judicial control, and the seizure is followed promptly by a guaranteed adversary hearing and the return of the property to the

debtor unless the creditor proves the grounds for the replevin. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Finally, a general pre-judgment property attachment procedure, which permits a creditor, on ex parte application, to seize property in which he has no pre-existing interest and the loss of which may cause serious hardship to the debtor, must at least satisfy the Mitchell requirements of careful judicial control over the initial seizure and the guaranteed return of the property to the debtor unless the creditor proves the grounds for the attachment at a prompt post-attachment adversary hearing. North Georgia Finishing Co. v. Di-Chem, _____ U.S. _____, 42 L.Ed.2d 751 (1975).

A careful assessment of the risk of error, limited creditor interest, and

potentially severe debtor hardship inherent in the procedure compels the conclusion that the New York pre-judgment attachment statute in issue here is fatally deficient in fundamental due process safeguards for the debtor. The New York attachment procedure permits summary seizure, on the creditor's ex parte application, of property in which the creditor has no pre-existing interest. Because of the broad reach of the statute, it potentially subjects a debtor to the risk that he will be summarily deprived of assets essential to the basic survival of himself and his family. Wages may not be attached, but once in the hands of the debtor and converted into, for example, a bank deposit, they become immediately susceptible to seizure. Finally, the issues of fraud

and deceit which are made relevant by CPLR §§6201 (4), (5) and (8) to the pre-judgment attachment are neither uncomplicated nor narrowly confined, but rather, implicating as they do subjective elements of motive and intent, inherently involve factual and credibility determinations which lend themselves only to full adversarial resolution.

In view of the complexity of the issues made relevant to the attachment and the absence of any pre-existing creditor interest in the property attached, it is evident that the risk that the initial ex parte attachment will be erroneous is substantial. Further, the lack of any prior creditor interest in the attached property, together with the potentially severe impact of the attachment upon the debtor and his

family, will in many cases make the creditor's need for pre-judgment attachment minimal as compared to the debtor's interest in avoiding even temporary deprivation of his property. In all of these respects, the New York general pre-judgment property statute stands in sharp contrast to the Louisiana sequestration statute sustained in Mitchell, where the issues were simple, the creditor's pre-existing property interest substantial, and the potential impact on the debtor relatively slight. Accordingly, the constitutional requirement that the initial advantage obtained by the creditor through ex parte attachment be effectively counter-balanced by the guarantee to the debtor of a prompt and adequate post-seizure adversary

hearing is even more compelling in this case than it was in Mitchell. If initial ex parte attachment, without prior notice and opportunity for the debtor to be heard, is constitutionally permissible here, then due process at least requires that the debtor be entitled to the return of his seized property unless the creditor successfully proves the grounds for the attachment at a prompt post-attachment adversary hearing. Upon analysis it is clear that, as the three-judge court concluded below, the New York procedure falls woefully short of satisfying this fundamental due process requirement.

B. The Post-Attachment Hearing Afforded By The New York Pre-Judgment Property Attachment Procedure Is Constitutionally Deficient.

The Louisiana sequestration statute in

issue in Mitchell specifically provided on its face that the debtor could by motion obtain the dissolution of the attachment unless the creditor proved the grounds upon which it was obtained (Article 3506). Standing in sharp contrast to that provision is the section of the New York pre-judgment property attachment statute which provides for the vacating of the attachment upon the debtor's motion. Aside from narrowly providing that the attachment shall be vacated where a non-resident debtor has appeared and shown that he has adequate assets available to render the attachment unnecessary to the creditor's security,[1] CPLR §6223 is barren of any indication of

1. This provision was recently added to CPLR section 6223 to supply a limited ground for the vacatur of an attachment secured primarily for jurisdictional purposes. 7A Weinstein-
(continued)

what must be established, and by whom, to justify continuation or vacatur of the attachment. In leaving this void to be filled by decisional law, the statute inevitably commits to the discretion of the state courts the crucial decision as to the showing required for vacatur of an attachment and as to who bears the burden of proof. Such a legislative delegation of unbounded discretion to the courts plainly incurs the risk that the decisional law will fail to guarantee the debtor that meaningful opportunity to secure the return of property seized ex parte which due process requires.

The danger created by the statute that the post-attachment hearing may be construed

(continued from p. 19)
Korn-Miller, New York Civil Practice, §6223.16 (1974); 3 N.Y. Adv. Comm. Rep., 358 (1959); (continued)

by the New York State courts to afford the debtor far less protection than is constitutionally required to counterbalance the initial ex parte attachment is strikingly confirmed by a careful examination of state court decisions extending over the past seventy years. Upon analysis, it is clear that the §6223 post-attachment hearing, as construed by the New York State courts, occasions only the court's re-examination of the creditor's papers upon which the initial ex parte attachment was obtained to determine whether they, as supplemented by any additional papers the creditor chooses to submit, continue to justify the

(continued from p. 20)
Zieberg v. Robosonics, Inc., 43 Misc.2d 134, 250 N.Y.S. 2d 368 (App. Term, 1 Dept., 1964).

attachment, without regard to the debtor's attempts to put into issue the creditor's allegations. Stripped of niceties, the §6223 post-attachment hearing is really no more a test of the validity of the creditor's claimed grounds for attachment, and no more a safeguard against the wrongful taking of the debtor's property, than was the initial ex pa te attachment.

1. The Creditor's "Burden" of Showing a Prima Facie Case.

By statute New York has required as the grounds sufficient to justify a pre-judgment property attachment under CPLR Article 62 that the plaintiff-creditor show, on ex parte application, [2] a cause of action,

2. Although CPLR §6211 on its face only permits and does not mandate ex parte attachment, amicus' exhaustive research of New York decisions has disclosed not a single case where the court actually required notice to the debtor prior to the attachment.

one or more grounds for attachment -- here the defendant-debtor's fraud or fraudulent intent -- and the amount demanded in excess of known counterclaims. CPLR §§6212(a), 6201(4), (5) and (8). In order to successfully resist the debtor's §6223 motion to vacate the attachment because of the absence of a cause of action or a ground for attachment, the creditor need only sustain again the burden which was required of him in obtaining the initial attachment, that is, of making out a prima facie case. American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); Zenith Bathing Pavilion v. Fair Oaks S.S. Corp., 240 N.Y. 307, 312, 148 N.E. 532 (1925); Stines v. Hertz Corp., 22 A.D.2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965);

Waterman-Bic Pen Corp. v. Waterman Pen Co., 8 A.D. 2d 378, 187 N.Y.S. 2d 872 (1 Dept., 1959); AMF Incorporated v. Algo Distributors Ltd.,(App. Div., 2 Dept., June 9, 1975) N.Y.L.J., p.1, col.7, June 23, 1975.[3] To make out a prima facie

3. Godbout v. Irwin, 272 App. Div. 1020, 73 N.Y.S. 2d 565 (2 Dept., 1947); Goldmark v. Magnolia Metal Co., 28 App. Div. 264, 266, 51 N.Y.S. 68 (1 Dept., 1898) aff'd. 170 N.Y. 579, 63 N.E. 1117 (1902); Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 1033, 29 N.Y.S. 2d 747(Sup. Ct., N.Y. Cty., 1941) aff'd. 263 App. Div. 712 (1 Dept., 1941); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965); Atlantic Raw Materials, Inc. v. Almarex Products,154 N.Y.S. 2d 998, 1000 (Sup. Ct., N.Y. Cty., 1950); Banco Agricola v. Jiminez Export, 97 N.Y.S. 2d 437, 439-40 (Sup. Ct., N.Y. Cty., 1950); ECCO High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S. 2d 610, 612 (Sup. Ct., N.Y. Cty., 1948), aff'd. 85 N.Y.S. 2d 304 (App. Div., 1 Dept., 1948); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); Aerotrade, Inc. v. Banque National de la Republique D'Haiti, 376 F. Supp. 1286, 1287 (S.D.N.Y., 1974); Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F. Supp. 64, 66 (S.D.N.Y., 1968).

case the creditor is required only to present papers which "contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated." (emphasis supplied). Krellberg v. Gregory, 10 A.D. 2d 824, 199 N.Y.S. 2d 152 (1 Dept., 1960).[4]

4. Stines v. Hertz Corp., 22 A.D. 2d 823, (2 Dept. 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 662, 664, 166 N.Y.S. 92 (1 Dept. 1917); Pfaltz & Bauer, Inc. v. Wiener, 181 App. Div. 793, 794, 169 N.Y.S. 223 (1 Dept. 1918); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151, 288 N.Y.S. 944 (1 Dept. 1936); Banco Agricola v. Jiminez Export, 97 N.Y.S. 2d 437, 439-40 (Sup. Ct., N.Y. Cty., 1950); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); ECCO High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S. 2d 610 (Sup. Ct., N.Y. Cty., 1948), aff'd. 85 N.Y.S. 2d 304 (App. Div. 1 Dept., 1948).

If the creditor makes out a prima facie case, and unless the creditor's papers "clearly establish that the plaintiff must ultimately be defeated,"(Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965)), the debtor's motion to vacate must be denied. Wulfsohn v. Russian Republic, 234 N.Y. 372, 377, 138 N.E. 24 (1923); Zenith Bathing Pavillion v. Fair Oaks SS. Corp., 240 N.Y. 307, 311, 148 N.E. 532 (1925); American Reserve Ins., Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); California Packing Corp. v. Kelly Storage & Dist. Co., 228 N.Y. 49, 53-54, 126 N.E. 269 (1920); Lamborn v. Lake Shore Banking & Trust Co., 231 N.Y. 616, 132 N.E. 911 (1921).[5] Finally, only those counterclaims of the defendant which

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5. AMF Incorporated v. ALGO Distributors Ltd., (App. Div., 2 Dept., June 9, 1975), N.Y.L.J., p.1, Col.7, June 23, 1975; Freedman v. Wilson Securities Corp., 31 A.D. 2d 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Waterman-Bic Pen Corp. v. Waterman Pen Co. Ltd., 8 A.D. 2d 378, 379, 187 N.Y.S. 2d 872 (1 Dept., 1959); Godbout v. Irwin, 272 App. Div. 1020, 73 N.Y.S. 2d 565 (2 Dept., 1947); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151, 288 N.Y.S. 944 (1 Dept., 1936); Bard-Packer Co.,Inc. v. Dictograph Products Co., Inc., 258 App. Div. 638, 17 N.Y.S. 2d 588 (1 Dept., 1940); Severnoe Securities Corp. v. Westminster Bank, Ltd., 214 App. Div. 14, 210 N.Y.S. 629 (2 Dept., 1925); Romeo v. Garofalo, 25 App. Div. 191, 49 N.Y.S. 114 (1 Dept., 1898); Marshall v. Knight, (Sup. Ct., N.Y. Cty., Dec. 23, 1974), N.Y.L.J., p.2, Col.3, Dec. 24, 1974; Mirabella v. Banco Ind., Argentina, 38 Misc. 2d 128, 136 237 N.Y.S. 2d 499 (Sup. Ct., N.Y. Cty., 1963); Compania Panamena v. Inter-Union Lines, 17 Misc. 2d 497, 187 N.Y.S. 2d 449 (Sup. Ct., N.Y. Cty., 1959); Montenegro v. Roxas, 141 N.Y.S. 2d 681, 683 (Sup. Ct., N.Y. Cty., 1955); Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 1033, 29 N.Y.S. 2d 747 (Sup. Ct., N.Y. Cty., 1941), aff'd 263 App. Div. 712, 31 N.Y.S. 2d 670 (1 Dept., 1941);American Jerex Co. v. Universal Alum. Extrusion, Inc., 340 F. Supp. 524, 529, (E.D.N.Y., 1972); Chase Manhattan Bank (Nat. Assoc.) v. Banque Intra, S.A. 274 F. Supp. 496 (S.D.N.Y., 1967); Marklin v. Drew

(continued)

"plaintiff is willing to concede as just" are considered in measuring the amount demanded from the defendant under §6212 (a). American Jerex Co. v. Universal Alum. Extrusions, Inc., 340 F. Supp. 524, 529 (E.D.N.Y., 1972); Freedman v. Wilson Securities Corp., 31 A.D. 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Bard-Parker, Co. Inc. v. Dictograph Products Co. Inc., 258 App. Div. 638, 640, 17 N.Y.S. 2d 588 (1 Dept., 1940); Marshall v. Knight, (Sup. Ct., N.Y. Cty., Dec. 23, 1974), N.Y.L.J., P.2, Col.3, Dec. 24, 1974.

(continued) Properties Corp., 280 F. Supp. 176, 177 (S.D.N.Y., 1967); Wilcox v. Richmond, Fredericksburg & Potomac R.R. Co., 270 F. Supp. 454, 458 (S.D.N.Y., 1967).

Given this extremely lenient standard of review of the creditor's alleged grounds for attachment, it is rare that the creditor's papers will be so patently defective as to require the vacatur of the attachment on the debtor's §6223 motion. The attachment will be vacated only where the allegations in the creditor's papers relating to his cause of action and the debtor's alleged fraud are based on no evidentiary facts whatsoever (Martin Enterprises Inc. v. M.S. Kaplan Co., 45 A.D. 2d 883, 385 N.Y.S. 2d 13 (2 Dept., 1974); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151 (1 Dept., 1936)), on pure hearsay (Hart v. Page Manufacturing Co., 187 App. Div. 296, 175 N.Y.S. 502 (2 Dept., 1919)), on mere rumor, suspicion, or conjecture (Zenith Bathing Pavillion v. Fair

Oaks S.S. Corp., 240 N.Y. 307, 311, 148 N.E. 532 (1925); Maitrejean v. Levon Properties, 45 A.D. 2d 1020, 358 N.Y.S. 2d 203 (2 Dept., 1974); Eaton Factors Co. v. Double Eagle Corp., 17 A.D. 2d 135, 136, 232 N.Y.S. 2d 901 (1 Dept., 1962); Nolan v. Workman Co., Inc., 146 Misc. 99, 261 N.Y.S. 534 (Sup. Ct., Queens Cty., 1932)), on mere "conclusory words " (Richman v. Richman, 41 A.D. 2d 993, 994, 344 N.Y.S. 2d 52 (3 Dept., 1973)), or on but a "scintilla of proof " (Macmillan, Inc. v. Hafner, 42 A.D. 2d 533, 344 N.Y.S. 2d 729 (1 Dept., 1973)). In short, the creditor "proves" his prima facie case if he can plead it "with a straight face" and can make some allegations of evidentiary value which show that the facts upon which he relies might be true. Reitmeister v. Reitmeister,

273 App. Div. 652, 79 N.Y.S. 2d 22 (1 Dept., 1948); Buell v. Van Camp, 119 N.Y. 160, 165, 23 N.E. 538 (1890); Rives v. Zeiss - Stiftung, 259 App. Div. 1051, 22 N.Y.S. 2d 206 (2 Dept., 1940); Hart v. Page Manufacturing Co., 187 App. Div. 296, 297, 175 N.Y.S. 502 (2 Dept., 1919). In his task of making out his prima facie case and avoiding the risk that his papers may be found to be hopelessly defective on their face, the creditor is generously assisted by the requirement that "the truth of all the facts stated must be assumed," (United States v. Brown, 247 N.Y. 211, 217, 160 N.E. 13 (1928); See also Zale Jewelry Co. v. Laine, 37 Misc. 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct., N.Y. Cty., 1962)), and that his papers "must be liberally construed

in favor of the plaintiff and every legitimate inference from the facts shown must be drawn in his favor." (Coakley v. Rickard, 136 App. Div. 489, 490, 121 N.Y.S. 280 (1 Dept., 1910).[6]

6. United States v. Brown, 247 N.Y. 211, 217, 160 N.E. 13 (1928); Maw v. Butler & Smith, Inc., 226 N.Y.S. 2d 649, 650 (App. Term, 1 Dept., 1962); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965); Zale Jewelry Co. v. Laine, 37 Misc. 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct., N.Y. Cty., 1962); ECCO High Frequency Corp. v. Amtory Trading Corp., 81 N.Y.S. 2d 610 (Sup. Ct., N.Y. Cty., 1948), aff'd.,85 N.Y.S. 2d 304 (App. Div. 1 Dept., 1948); Distillers Factors Corp. v. Country Distillers Products, Inc., 189 Misc. 497, 71 N.Y.S. 2d 165 (Sup. Ct., N.Y. Cty., 1947); Montenegro v. Roxas, 141 N.Y.S. 2d 681, 683 (Sup. Ct., N.Y. Cty., 1955); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 662, 166 N.Y.S. 92 (1 Dept., 1917); Stewart v. Lyman, 62 App. Div. 182, 70 N.Y.S. 936 (1 Dept., 1901); Worldwide Carriers, Ltd. v. Aris Steam Ship Co., 301 F. Supp. 64 (S.D.N.Y., 1968); Chase Manhattan Bank (Nat. Ass'n.) v. Banque Intra, S.A., 274 F. Supp. 496, 499 (S.D.N.Y. 1967).

Indeed, the burden which the creditor must meet to sustain the attachment against a §6223 motion is so slight that, after examining the New York precedents, Judge Learned Hand observed that the creditor's right to a continuing attachment is scrutinized "with less jealousy than upon a motion to dismiss the complaint for insufficiency in law." Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 248 (2 Cir., 1947) cert. denied 332 U.S. 772 (1947). Similarly, the New York Appellate Division, First Department has held:

> Upon a motion to vacate an attachment, the sufficiency of the complaint is not to be discussed and treated with the same elaboration as when the question of sufficiency is presented upon a demurrer. Undoubtedly it is the duty of the court to examine the pleading with a view to seeing if it is frivolous or so barren of substantial averments that no reasonable arguments can be urged in its support. But it would

> add greatly to the labors of the judges at Special Term if, upon every motion, the sufficiency of pleading could be brought in question and should then be disposed of with same elaboration as upon a demurrer. Goldmark v. Magnolia Metal Co., 28 App. Div. 264, 271, 51 N.Y.S. 68 (1 Dept., 1898), aff'd. 170 N.Y. 579, 63 N.E. 1117 (1902).

Thus, the "burden" shouldered by the creditor in order to defeat a §6223 motion to vacate is so slight that it provides no meaningful test of even the probable validity of the grounds of the attachment, that is, of the creditor's cause of action and, here, the debtor's alleged fraud. It unquestionably falls far short of the burden explicitly placed upon the creditor by the Louisiana sequestration statute of proving the grounds of the attachment. Accord, Vath v. Israel, 80 Misc. 2d 759, 761, 364 N.Y.S. 2d 97 (Sup. Ct., Queens Cty., 1975). But if the creditor's burden of showing a

prima facie case is innocuously light, the debtor's burden of proof on the §6223 motion is unbearably heavy, if not practically insurmountable.

2. The Debtor's Burden of Proving That the Creditor's Case Must Inevitably Fail.

If, on the §6223 motion, the court is satisfied that the creditor's papers continue to make out the prima facie case initially necessary to obtain the attachment ex parte, the burden rests squarely on the debtor seeking vacatur to prove, indeed to "clearly establish," that "the plaintiff must ultimately be defeated" on the merits of his underlying claim or on his fraud allegations. [7] Cocoline Choc. v.

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7. The debtor's problems in making and prevailing on a post-attachment motion to vacate are compounded by the delay permitted the creditor in serving the summons and complaint. While they must be filed within 10 days after the granting of an order of attachment,

Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965).[8] If this were not a hopeless enough task for the debtor, the

(continued fn. 7) CPLR §6212 (c), they need not be served upon the debtor until sixty days after the order is granted. CPLR §6213.

8. American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); Waterman - Bic Pen Corp. v. Waterman Pen Co., 8 A.D. 2d 378, 187 N.Y.S. 2d 872 (1 Dept., 1954); AMF Incorporated v. ALGO Distributors, Ltd., (App. Div. 2 Dept., June 9, 1975) N.Y. L.J., P.1, Col.7, June 23, 1975; Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 29 N.Y.S. 2d 747 (Sup. Ct ., N.Y. Cty., 1941), aff'd. 263 App. Div. 712, 31 N.Y.S. 2d 670 (1 Dept., 1941); American Jerex Co. v. Universal Alum. Extrusions, Inc., 340 F. Supp. 524, 558 (E.D.N.Y., 1972); B.B. Weit Printing Co. v. Frances Denmey, Inc., 300 F. Supp. 405, 408 (S.D.N.Y., 1969); World-Wide Carriers, Ltd., v. Aris Steamship Co. Ltd., 301 F. Supp. 64, 67 (S.D.N.Y.,1968); Marklin v. Drew Properties Corp., 280 F. Supp. 176, 179 (S.D.N.Y.,1967); Weinstein-Korn-Miller, New York Civil Practice, §§6223.05, 6223.11, Pp. 62-209, 62-219 (1974).

court's determination of whether the plaintiff "must ultimately fail" is made exclusively with reference to the creditor's papers, without regard to any contrary factual evidence presented by the debtor. Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Freedman v. Wilson Securities Corp., 31 A.D. 2d 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Zale Jewelry Co. v. Laine, 37 Misc., 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct.,N.Y. Cty., 1962).[9]

9. Compania Panamena v. Inter-Union Lines, 17 Misc. 2d 497, 187 N.Y.S. 2d 449 (Sup. Ct., N.Y. Cty., 1959); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 248 (2 Cir., 1947), cert. denied 332 U.S. 772 (1947).

Indeed, the New York courts have viewed the existence of a factual conflict between creditor and debtor, created by the debtor's submission of contradictory affidavits and exhibits, as merely evidence that the creditor has at least made out a prima facie case sufficient to justify the attachment. Thus, the Court in Mirabella v. Banco Ind., Argentina, 38 Misc. 2d 128, 136, 237 N.Y.S. 2d 499 (Sup. Ct., N.Y. Cty., 1963), reasoned as follows:

> I cannot determine from the complaint and the conflicting affidavits that plaintiff cannot ultimately succeed. Since the warrant of attachment may be vacated only if the papers clearly establish that plaintiff must ultimately fail (American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325; Bard-Parker Co. v. Dictograph Prods. Co., 258 App. Div. 638, 640; Compania Panamena v. International Union Lines, 17 Misc. 2d 497, 498), this motion must be denied.
>
> In short, the debtor in attempting to

sustain his extraordinarily heavy burden of proof can only hope, at best, to assist the court in examining the creditor's papers for deficiencies which are self-defeating on their face and which will inevitably condemn the creditor's case to ultimate failure. District Judge Motley made the point in language which is actually restrained in view of the heavy odds against the debtor seeking to vacate an attachment:

> "In motions of this type, defendant has formidable obstacles to surmount - not only must defendant carry the burden of showing that plaintiff must ultimately fail, 7 Weinstein, Korn & Miller, New York Civil Practice, ¶ 6223.05 (1966), but also 'the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the stated facts.' Cocoline Chocolate Co. v. Hillside Enterprises, Inc., 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444, 446 (Sup. Ct. Kings Co.,1965). See also United Steel Warehouse Corp. v. Del-Penn Steel Company, 212 N.Y.S. 2d 157 (Sup. Ct. Kings Co. 1961)." Chase Manhattan

Bank (Nat. Ass'n.) v. Banque Intra, S.A., 274 F. Supp. 496, 499(S.D.N.Y., 1967).

Even the debtor who successfully sustains his heavy burden of proving that the creditor's cause of action or fraud allegation is so hopelessly defective as to inevitably fail is not necessarily rewarded with the vacatur of the attachment. Under such circumstances the statute conveniently extends to the creditor a final opportunity to rehabilitate his papers by guaranteeing him "a reasonable opportunity to correct any defect." CPLR §6223. See Krellberg v. Gregory, 10 A.D. 2d 824, 199 N.Y.S. 2d 152 (1 Dept.,1960); Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 595, 257 N.Y.S. 2d 444

(Sup. Ct., Kings Cty., 1965); Worldwide Carriers, Ltd. v. Aris Steamship, Co. Ltd., 301 F. Supp. 64, 66 (S.D.N.Y. 1968).

Thus it is clear that far from entitling the debtor to a post-attachment adversary hearing at which the creditor must prove the grounds of the attachment, or even the probable validity thereof, CPLR §6223 guarantees the debtor nothing but the empty promise of a hearing which is, at bottom, nothing more than the occasion for the court's re-examination of the untested allegations of the creditor to determine whether they continue to make out a prima facie case. Only in a purely formal sense can the §6223 hearing be called "adversary", and in no practical sense can it be said that the creditor bears any meaningful burden of proving even the pro-

bable validity of the grounds for the attachment. While the debtor is given the nominal opportunity to be heard, nonetheless, no matter how loudly or forcefully he speaks he cannot, even by genuinely putting into issue the unilateral assertions of the creditor, succeed in undoing the attachment. Only the creditor's own papers, by their inherent deficiencies, can defeat themselves.

CONCLUSION

Because of these fundamental deficiencies, the New York post-attachment hearing fails grievously to serve its constitutionally necessary function of restoring a modicum of balance and fairness to a procedure which, with substantial risk of error, allows the creditor to obtain an attachment of the debtor's property ex parte. Especially in

view of the complexity of the issues made relevant to the attachment by the New York statute -- the debtor's fraud and the merits of the creditor's underlying claim -- the narrow and truncated §6223 hearing plainly fails to significantly minimize the dangers of a wrongful taking inherent in the initial ex parte attachment. The risk of error thus perpetuated through the inadequacies of the post-attachment hearing is especially intolerable in view of the total absence of a prior creditor interest in the property seized and the potentially devastating impact on the debtor of the property deprivation permitted by the sweep of Article 62. Accordingly, the New York pre-judgment property attachment procedure is patently unconstitutional for failure to effect that

fair accommodation of the conflicting interests of creditor and debtor which due process requires, and the judgment of the three-judge court below should be affirmed.

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